

QUARTERLY REPORT
OF THE
ATTORNEY GENERAL
OF
ALABAMA

For the Period

January 1, 1948

Through March 31, 1948

Volume No. 50

TO ALL STATE AND COUNTY OFFICERS OF ALABAMA:

In accordance with Code 1940, Title 55, Section 228, I am submitting to you the Quarterly Report of the Opinions of the Attorney General of Alabama. This Report covers all opinions rendered by the Attorney General from January 1, 1948, through March 31, 1948.

The Section of the Code referred to above requires that seven copies of this Quarterly Report be sent to each of the Probate Judges in the State and the Probate Judge shall in turn deliver one volume each to the Clerk of the Circuit Court, the Sheriff, the Tax Collector, the Tax Assessor, the County Superintendent of Education, and Deputy or County Solicitor. Said Code Section also requires a copy of said Report to be sent each Circuit Solicitor and the chief executive officer of each incorporated municipality in the State.

If you have any suggestions to make regarding the improvement of the service, we should be glad to receive it.

The office of the Attorney General is anxious to render prompt and efficient service to the State and county officials.

Very respectfully,

A. A. CARMICHAEL,
Attorney General.

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OPINIONS



January 5, 1948.

Mr. A. B. Jefferies, Chairman,
Board of Revenue and Road Commissioners,
Mobile County,
Mobile, Alabama.

Counties—Municipalities—Hospitals—Insane Persons.

1. Counties, cities, and towns are authorized to establish facilities to maintain sick persons, and may appropriate public funds for indigent sick persons. Title 22, Sections 189, 190, Code of Alabama 1940.

2. An insane person is sick. Title 22, Sections 189, 190, Code of Alabama 1940.

Opinion by Assistant Attorney General Sykes.

Dear Sir:

Your request for an official opinion bearing date of October 24, 1947, is as follows:

"Your official opinion is respectfully and immediately requested upon the following important public questions:

"(1) What is the duty, as well as the legal authority of Mobile County, and the municipalities within Mobile County, as regards provision for the temporary housing and care of insane persons awaiting commitment to and delivery to State Insane Hospitals?

"(2) Is Mobile County, and the cities within Mobile County, either or both, precluded from or without lawful authority to separately or jointly erect, set up, staff and operate a facility or hospital for the purpose of giving temporary care and treatment to an indigent non-arrested insane person while proceedings for his or her commitment to an Alabama State Insane Hospital are being carried out under Chapter 5 (Sections 207 et seq) of Title 45 of the Code of Alabama of 1940?

"(3) Is the city of Mobile without duty, as well as legal authority, to join and/or assist Mobile County in providing for and maintaining a facility for the temporary housing and care of mentally diseased persons awaiting commitment to and delivery at a proper Alabama State Insane Hospital? In answering this question, please bear in mind there is no public hospital or other facility (exclusive of the county jail) available for the temporary care of such unfortunates, be they or their relatives or friends with or without means of paying for same, and further bear in mind that the commitment of such unfortunates to the County Jail does not embrace all per-

sons who may require commitment to a State Hospital, but only those found at large and not under the restraint of any person. See Section 432, Title 15.

"It seems apparent, however, that the cost of transfer of any indigent mentally diseased person committed to an Alabama Insane Hospital under any of the conditions above referred to, is an expense of the County.

"For your information, I enclose herewith a copy of the letter opinion given to me by County Attorney William V. McDermott under date of October 3, 1947."

The corporate authority of all cities and towns and governing body of any county may establish hospitals for temporary or permanent care of the sick. Title 22, Section 189, Code of Alabama 1940.

County governing bodies or city governing bodies may appropriate funds to aid in maintaining and taking care of sick persons who are unable to provide for themselves. Title 22, Section 190, Code of Alabama 1940.

In my opinion, an insane person is sick.

I find no legal duty upon counties or the cities and towns to care for nonarrested insane persons. Counties, cities, and towns, however, are authorized by the above cited statutes to undertake this work to the extent of their financial ability.

Very truly yours,

A. A. CARMICHAEL,
Attorney General.

January 6, 1948.

Hon. John R. Coffman,
Clerk and Register of Circuit Court,
Limestone County,
Athens, Alabama.

Clerks of Circuit Courts—Fees—Final Records.

1. Under Title 13, Section 198 (9), Code of Alabama 1940, where a former clerk of a circuit court failed to make final records before his office was vacated, the new clerk is required to make same only in cases finally determined within six months immediately preceding his assumption of office.

2. Clerk of a Circuit Court is under duty to make final record in each criminal case, even though organization of the court is unavailable for incorporation therein; and is entitled to

fee of 15¢ per one hundred words for making same under Title 11, Section 89, Code of Alabama 1940, as amended by Act No. 375, General Acts 1947 (Ms.), approved August 16, 1947.

Opinion by Assistant Attorney General Screws.

Dear Sir:

Your request for an official opinion, bearing date of November 18, 1947, is as follows:

"A former Clerk and Register of the Limestone County Circuit Court died in April 1946, and after being succeeded, temporarily for about one month by another party, I was appointed to serve out the unexpired term of the former elected Clerk and, was at the same time appointed by the Presiding Judge of this District to serve as Register of the Circuit Court, in Equity. Before the former Clerk and Register died, there were some eleven cases tried and sentenced to State penitentiary, and there was included in the cost bills as paid by the State a \$3.00 fee for making the final record in each of the eleven cases, and I have received these fees. The cost bills in these eleven cases were made up and submitted and paid by the State all within six months from the final date of disposition and based upon items entered on the fee book by the former clerk. Under paragraph 9 of Section 198, Title 13 of the Code of Alabama, it is the duty of the Clerk of the Circuit Court to record in well-bound books within six months after the final determination of any suit or prosecution, all the proceedings relating thereto, not previously recorded under Section 5 of Title 7, except the subpoenas, affidavits for continuance, commissions to take testimony, evidence and executions, but after the cost bills were submitted, I found that the final record had not been made by the former Clerk, and that under your Ruling, dated September 13, 1940, found on Page 279, Vol. 20, Quarterly Report of Attorney General, 'The Organization of Court should be included in the Final Record of each Criminal Case.'

"To this date, I have not been able to complete this final record, due to the fact that the venire making up the Grand Jury and Petit Jury for the 1946 Spring Term of Court was not recorded by the former Clerk in the Minutes of the Court and, although I have made diligent search and inquiries for the list of such venire, I have been unable to locate same, and for this reason, I am unable to complete or make the final record in each of these eleven cases and, as the State Examiners are checking my records now, I desire to have your advice just what to do about making this final record when the organization of the Court cannot be found.

"I realize if I am permitted to make the Final Record without including the organization of the Court, I will not be entitled to as much as \$3.00 in each case, and will be due to refund a certain amount to the State.

"1. Under the circumstances as mentioned above, will it be my duty to make this final record in each of the eleven cases without including therein the Organization of the Court?"

"2. If your answer to question 1 is yes, will I be entitled to charge at the rate of 15¢ per one hundred words for making this final record, which is incomplete without the organization of the Court?"

I am of the opinion that your first inquiry should be answered in the affirmative, provided the final determination of the cases in question occurred within six months immediately preceding your assumption of office.

Title 13, Section 198(9), Code of Alabama 1940, provides as follows:

"§198. Duties of Clerk.—It is the duty of the clerk of the circuit court: * * * (9) To record in well-bound books within six months after the final determination of any suit or prosecution, all the proceedings relating thereto, not previously recorded under section 5 of title 7, except the subpoenas, affidavits for continuance, commissions to take testimony, evidence and executions. * * *"

This office has heretofore ruled that where a former register in chancery failed to make final records before his office was vacated, the new register was not required to make a final record for cases finally determined more than six months prior to his taking office, but he should make such record in those cases finally determined within six months immediately preceding his appointment.—Quarterly Report of Attorney General, Vol. 46, page 14 cf; Quarterly Report of Attorney General, Vol. 24, page 122. The provisions of the statute requiring registers to make final records within six months after the determination of any cause (Title 13, Section 213(7), Code of Alabama 1940) is the same in legal effect as Title 13, Section 198 (9), quoted above. Therefore, the holding of these opinions is equally applicable to the present situation.

It is true that the final record in each criminal case should include the organization of the court.—Quarterly Report of Attorney General, Vol. 20, page 279. If it is impossible to secure the records of the venire of the grand and petit juries involved, the same could not, of necessity, be included therein. However, this omission would not relieve you from making a final record, otherwise complete, in those cases in which it is your duty to so do.

In answer to your second inquiry, it is my opinion that in those cases in which you are required to make a final record, without including the organization of the court, you would be entitled to the usual fee of 15¢ per hundred words for the making of same.—Title 11, Section 89, Code of Alabama, as amended by Act No. 375, General Acts 1947 (Ms.), approved August 16, 1947. See also Title 45, Section 69, Code of Alabama 1940.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

January 6, 1948.

Hon. Frank Grigg,
Clerk, Circuit Court,
Jackson County,
Scottsboro, Alabama.

Counties—Clerks of Circuit Court—Telephones—Intercommunication System.

County governing body authorized to purchase and install a two-way intercommunication system between office of clerk of circuit court and court room under the authority of Title 12, Section 13, Code of Alabama 1940, as such is considered as tantamount to a telephone extension.

Opinion by Assistant Attorney General Screws.

Dear Sir:

Your request for an official opinion, bearing date of November 6, 1947, is as follows:

"In the Jackson County Court House, the office of the Circuit Clerk is on the first floor of the Court House and the Court Room is on the second floor. During terms of court it is frequently necessary for the clerk, whose attendance is necessary in the court room, to communicate with his office in regard to procuring records, files, releasing jurors and issuing witness certificates, etc. These trips to and from the court room to the clerk's office frequently cause delays in the operation of the court. I, therefore, request an opinion from you as follows: Can Jackson County purchase for the use of the Circuit Clerk a small two-way intercommunication system to be connected between the clerk's office and the clerk's desk in the court room?"

I am of the opinion that your inquiry should be answered in the affirmative.

Title 12, Section 12(15), Code of Alabama 1940, as amended by Act No. 344, General Acts 1945, page 560, designates which county offices must be furnished with telephones (including clerks of the circuit courts). Title 12, Section 13, Code of Alabama 1940, makes it discretionary with boards of revenue, or courts of county commissioners, as to the furnishing of other offices in the courthouse, not designated in Title 12, Section 12(15), as amended, *supra*, with telephones.—Biennial Report of Attorney General, 1934-36, page 382.

This office has heretofore ruled that under the authority of Title 12, Section 13, *supra*, a deputy solicitor's office in the courthouse may be equipped with an extension telephone, if same is deemed necessary for

the proper performance of his duties by the county governing body.—Quarterly Report of Attorney General, Vol. 17, page 381.

The two-way intercommunication system, referred to in your letter, may, in my opinion, be considered as tantamount to a telephone extension, which, the county governing body, in its discretion, may authorize. When so authorized, the purchase price and installation costs become a proper charge against the county.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

January 6, 1948.

Hon. Bert E. Thomas,
Director, Department of Conservation,
CAPITOL.

Informer's Fees—Costs and Fees—Nonsalaried officers.

Title 8, Section 55, Code of Alabama 1940, as amended by Act No. 296, General Acts 1945, page 493, approved July 7, 1945, provides for informer's fees to nonsalaried officers only, and a regularly salaried and regularly employed deputy sheriff is not such a nonsalaried officer.

Opinion by Assistant Attorney General Sykes.

Dear Sir:

Your request for an official opinion bearing date of November 14, 1947, is as follows:

"On 7 July 1945 the Governor approved an Act of the Alabama Legislature which appears in the General Acts of Alabama, page 493 and which is brought forward in the 1945 Supplement of the Code as Section 55, Title 8. This act amends the original Section 55, Title 8. The act in question is quoted as follows:

"Fees of arresting officers.—When an arrest for a violation of the provisions of the game and fish laws is made by a salaried officer and the defendant is convicted, there shall be taxed, as costs, the same fee as a sheriff in this state is entitled to for similar services, and if collected from the defendant shall be immediately remitted by the trial court to the director of conservatoin and said fee shall be used for the purpose of the administration of the game, fish and seafoods division of the department of conservation. If the officer making the arrest be a non-salaried warden or officer, and if said fee is collected from the defendant, such non-salaried warden or

officer shall be entitled to said fee and shall receive in addition thereto an informer's fee of one-half of the fine in each case where the information furnished by him results in a conviction and the fine is collected and paid into court. No fee shall be allowed in cases of acquittal.'

"I would like to have your official opinion as to whether or not a regularly salaried and regularly employed deputy sheriff who furnishes information resulting in the conviction of a violation of a game or fish law and the fine is collected and paid into court shall be entitled to one-half of the fine in such case as an informer's fee under the terms of the Act above quoted.

"Your usual prompt attention in handling such matters will be greatly appreciated."

By the express terms of Act No. 296, General Acts 1945, page 493, approved July 7, 1945, Section 1 of which is quoted in your inquiry, the officer claiming an informer's fee must be a nonsalaried officer.

In my judgment, a regularly salaried and regularly employed deputy sheriff is not a nonsalaried officer, and cannot claim the informer's fee.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

January 6, 1948.

Hon. John E. Mandeville,
Clerk, Circuit Court,
Mobile County,
Mobile 15, Alabama.

Municipalities—Costs and Fees.

1. Costs accruing in circuit court on appeal by defendant from conviction for violating city ordinance cannot be taxed against municipality when defendant does not appear.

2. On appeal to circuit court from conviction in recorder's court for violating city ordinance, circuit court cannot tax costs of circuit court against defendant if he fails to appear.

Opinion by Assistant Attorney General Sykes.

Dear Sir:

Your request for an official opinion, bearing date of November 7, 1947, is as follows:

"Your opinion is requested in reference to the following matter:

"John Doe was arrested by the Police Department of the city of Mobile for violating a City Ordinance. He was tried by the Recorder of the City of Mobile, convicted, and appealed the case to the Circuit Court of Mobile County, Alabama, Criminal Division. When the case was called in the Circuit Court the Defendant failed to appear and in conformity with Title 37, Section 588, Code of Alabama of 1940, the appeal was dismissed and the Clerk of the Circuit Court notified, in writing, the Recorder of the judgment of the Circuit Court dismissing such appeal. The papers in the case, together with a cost bill of the costs accruing in the Circuit Court, were returned to the Recorder's Court and a proper receipt taken for the same.

"Questions:

"1. In the event the Defendant is arrested by the Police Department after the case has been dismissed in the Circuit Court and is unable to pay the fine and costs, would the City of Mobile be liable for the costs accruing in the Circuit Court?

"2. In the event the Defendant is arrested by the Police Department after the case has been dismissed in the Circuit Court, on motion of the City Attorney for the City of Mobile in the Circuit Court, and is unable to pay the fine and costs, would the City of Mobile be liable for the costs accruing in the Circuit Court?

"3. In the event the Defendant is arrested by the Police Department after the case has been dismissed in the Circuit Court, by the Court on its own motion, and is unable to pay the fine and costs, would the City of Mobile be liable for the costs accruing in the Circuit Court?

"4. In the event the Defendant is not arrested by the Police Department after the case has been dismissed either on motion of the City Attorney or by the Court on its own motion, would the City of Mobile be liable for the costs accruing in the Circuit Court?

"Your attention is respectfully called to the following:

"1. Opinion of the Attorney General to Mr. O. L. Andrews dated June 28, 1944, as found in Quarterly Report of the Attorney General of Alabama for the period from April 1, 1944, thru June 30, 1944, Volume 35, Page 115, which states 'that a prosecution for the violation of a municipal ordinance is a quasi-criminal proceeding rather than a criminal proceeding.'

"2. Title 7, Section 518, which states that an 'execution may issue against the plaintiff, * * *, for all the costs created by him in obtaining his judgment.'

"3. Title 62, Section 353, Code of Alabama of 1940, which formerly held that the City of Mobile was liable in certain instances and Local Acts of 1945, Page 97, approved June 22, 1945.

"4. Opinion of the Attorney General to Mr. E. T. Knight dated February 12, 1942, as found in the Quarterly Report of the Attorney General of Alabama for the period from January 1, 1942, thru March 31, 1942, Volume 26, Page 109, which holds in a liquor nuisance case (equity) upon return of execution 'no property found' such costs were payable by the State of Alabama out of the Governor's Contingent Fund or the Governor's Emergency Fund, upon the approval of the Governor.

"5. In the case of the City of Selma v. Stewart, 67 Ala. 335, Biennial Report of Attorney General 1920-22, Page 177, to the effect that the liability of the city must be specific."

I find no authority of law for taxing costs in such case against the city of Mobile. All of your questions are based upon the fact that the defendant is convicted of violating a city ordinance in the Recorder's Court. He thereafter appeals to the Circuit Court of Mobile County, where he does not appear when the appeal is called for trial, and the case is dismissed when the appeal is called for trial, and the case is dismissed either by the motion of the city attorney or the court, because of the failure of the defendant to appear.

It is clear that under such circumstances costs cannot be taxed against the defendant. *Spann v. Town of Hartford*, 23 Ala. App. 17, 121 So. 436, cert. den. 219 Ala. 127, 121 So. 437.

I find no statute authorizing the costs accruing in the circuit court in the criminal case on appeal to be taxed against the city. The only statute (Title 62, Section 353, Code of Alabama 1940) authorizing such payment under the circumstances enumerated in that statute has been expressly repealed by Act No. 180, Local Acts 1945, page 97, approved June 22, 1945.

Of course, when the defendant does not appear in the circuit court on appeal, a forfeiture should be entered on his appearance bond. Title 37, Sections 587, 588, Code of Alabama 1940, and the costs attending such forfeiture proceedings should be taxed against the unsuccessful party. See *State for the use of Coosa County v. Parker*, 83 Ala. 269, 3 So. 552.

Since the city of Mobile has no control over whether or not an appeal is taken, nor control over the appearance of the defendant in the circuit court, and since the city does not fail in the prosecution and further because I find no statute authorizing payment by the city, it is my opinion that costs in the circuit court in the criminal case cannot be taxed against the city.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

January 7, 1948.

Hon. J. M. McLeod,
Judge of Probate,
Wilcox County,
Camden, Alabama.
Soldiers—Wills.

Will executed by soldier in actual military service and acknowledged before a notary public does not comply with the existing statutory laws of Alabama and cannot be probated under the same. Said will is a valid common law will and disposes of testator's personal property and should be probated as such after proof of same.

Opinion by Assistant Attorney General Kohn.

Dear Sir:

Your request for an official opinion, bearing date of November 21, 1947, is as follows:

"Will you kindly advise me as to whether or not the following will could be permitted to Probate under the laws of Alabama.

"Jacob Ralph Watson, a resident of Wilcox County, while a member of the Armed Services shortly prior to his departure overseas, executed a Last Will and Testament leaving all his estate to his wife, Mrs. Sara Shamburger Watson. This Last Will and Testament was executed at Harrisburg, Pennsylvania on the 5th day of July, 1944, and was not witnessed, however, it was 'Sworn to and subscribed before me this 5th day of July, 1944, Lillian Wilson, Notary Public, My Commission Expires January 5, 1947' with notary seal affixed thereon. Also, this Last Will and Testament was executed on a form provided by the Army of the United States and under the direction of the Army. Suffice it to say, Mr. Jacob Ralph Watson was killed in action and his widow would like to have this will probated.

"My attention has been called to an act of the Legislature, No. 78, approved June 9, 1945, as possible authority for me to permit this will to Probate.

"I am most anxious to cooperate with this soldier's widow and in the event above cited act does not give me the authority to admit this Will to Probate, then I would appreciate your advice as to whether or not I have this authority under any other law of Alabama.

"Thanking you for your immediate attention to this request, I remain,"

The Will is as follows:

"LAST WILL AND TESTAMENT

"I, _____ Jacob Ralph Watson _____, a legal resident of
_____ Furman (Wilcox Co.) _____, _____ Alabama _____, United States
(City, town or County) (State or district)

of America, now in the active military service as a _____ Pfc. _____,
(Grade)

_____ (Army serial 34804354), _____ In the Army of the United
States, do hereby make, publish and declare this instrument as my
last Will and Testament, in manner following, that is to say:

"1. I hereby cancel, annul, and revoke all wills and codicils by
me at any time heretofore made;

"2. I hereby give, devise, and bequeath to
_____ Sara Shamburger Watson, my wife _____
(Name of person or persons who are to inherit)

_____, now residing in _____ Tuscaloosa _____
with relationship, if any (City, town or county)
_____ Alabama _____, _____ America _____, all my estate and all of
(State or district) (Country)

the property of which I may die seized and possessed, and to which
I may be entitled at the time of my decease, of whatsoever kind
and nature, and wheresoever it may be situated, be it real, personal,
or mixed, absolutely;

"3. I hereby nominate, constitute, and appoint
_____ Sara Shamburger Watson, wife _____
(Name of Executor with relationship, if any)

of _____ Tuscaloosa _____, _____ Alabama _____, United States of
(City, town or county) (State or district)

America, as my (executrix) and request that (she) be permitted to
serve without bond or without surety thereon;

"4. I hereby authorize and empower my (executrix) in (her)
absolute discretion to sell, exchange, convey, transfer, assign, mort-
gage, pledge, invest, or reinvest the whole or any part of my real
or personal estate.

"IN WITNESS WHEREOF, I have hereunto set my hand and
seal this my last Will and Testament, at _____ Harrisburg, Pennsylvania _____,
(Place of execution)

this _____ 5th _____ day of _____ July _____, 1944.

_____ Jacob Ralph Watson _____ (SEAL)
(Signature of testator)

"Signed, sealed, published, and declared by the above-named testator, _____Jacob R. Watson_____, to be his last Will and Testa-
(Name of testator)

ment in the presence of all of us at one time, and at the same time we, at his request and in his presence and in the presence of each other, have hereunto subscribed our names as witnesses, and do hereby attest to the sound and disposing mind of said testator and to the performance of the aforesaid acts of execution at _____
Harrisburg, Pennsylvania_____ this ____5____ day of ____July, 1944_____
(Name of execution)

_____ (Name)	_____ (Address)
_____ (Name)	_____ (Address)
_____ (Name)	_____ (Address)

"Sworn to and subscribed before me
this ____5th____ day of ____July, 1944____.

Lillian Wilson

NOTARY PUBLIC

My Commission Expires Jan. 5, 1947

HARRISBURG, PA."

I would like to call your attention to the fact that this will was made on what appears to be a government form and the blank spaces were filled in by Mr. Watson in his own handwriting.

I regret to advise that, in my opinion, even if we consider the signature of the notary as a witness, the will does not comply with Title 61, Section 24, Code of Alabama 1940, which provides as follows:

"§ 24. Wills to be in writing; how signed and attested.—No will is effectual to pass real or personal property, except in the cases hereinafter provided for, unless the same is in writing signed by the testator or some person in his presence, and by his direction, and attested by at least two witnesses, who must subscribe their names thereto in the presence of the testator."

This instrument should not be considered as a will under the statutory laws of Alabama. A decree of your Court probating this will under the existing statutes would be void. *Blacksher Co. et al. v. Northrup*, 176 Ala. 190, 57 So. 743.

I wish to call your attention to Title 61, Section 30, Code of Alabama 1940, which provides as follows:

"§ 30. Soldiers, seamen, and marines may make wills as heretofore.—No provision in this article must be construed to prevent soldiers in actual military service, or marines or seamen at sea,

from disposing of their personal property as they might have done before the adoption of this Code."

Section 1617, Code of Alabama 1852, provides as follows:

"§ 1617. No provision of this article must be construed to prevent soldiers in actual military service, or mariners or seamen at sea from disposing of their personal property as they might have done before the adoption of this Code."

To ascertain the manner by which soldiers and sailors might dispose of their personal property before 1852, it is necessary to go back to the common law which prevailed in this State before the adoption of the Code of 1852.

The privilege enjoyed by mariners and soldiers, freeing them of the necessity of conforming to ordinary formal requirements in the execution of wills, has been said to have been borrowed from the civil law. Caesar favored his troops with this concession, and later it was extended to members of the naval service. At early English common law no such special treatment was needed, because the law, recognizing the rarity of literacy, generally allowed nuncupation of personal property. However, as learning spread, oral wills were frowned upon and by 1677 the Statute of Frauds severely limited verbal bequests, but excepted the wills of soldiers from the requirement of writing, as did the English Wills Act of 1837.

In the case of *Rice v. Freeland*, 109 S. E. 186, the Supreme Court of Appeals of Virginia in 1921, in holding that a letter from a soldier in France to his wife was a will and disposed of his personal property, said:

"We are frankly, and we believe properly, relaxing in some measure the ordinary rules of construction in this case, and we are doing so in recognition of the general tendency of the Legislatures and the courts to treat soldiers in actual service as belonging to a class of persons entitled to public gratitude and to special consideration in respect to their private and property interests."

The latitude permitted in regard to nuncupative wills of soldiers and the origin and history of so-called soldiers' wills" is interestingly discussed in the opinion of Surrogate Bradford in *Ex parte Thompson*, 4 Bradf. Sur. 154, which closes with the following statement:

"Nor has any particular mode been prescribed in respect to the manner of making the testament. The very essence of the privilege consists in the absence of all ceremonies as legal requisites; or, as Merlin states the proposition, 'Their form was properly to have no form.' It is true, the Roman law required two witnesses; this, however, did not relate to the essence of the act, but only to the proof. In respect to evidence, we do not follow the civil or the canon law; no particular number of witnesses is required to verify an act judicially, and all the court demands is to be satisfied by sufficient

evidence as to the substance of the last testamentary request or declaration of the deceased. This ascertained, the law holds it sacred, and carries it into effect, with as much favor and regard as would be paid to the most formal instrument, executed with every legal solemnity."

In the case of *Barnewall v. Murrell*, 108 Ala. 366, our Supreme Court in 1895 said:

"By the common law, wills of personal property were valid and operative, though not written or signed by the testator, or attested by witnesses, if written in accordance with his instructions; and the rule of the common law prevailed here, until the adoption of the Code of 1852. * * * *"

The premises considered, it is my opinion that the will signed by the late Private Watson and acknowledged before a notary public in Pennsylvania is a valid common law will of personal property and as such, it may be probated in Alabama.

I suggest that before you probate this will, you have the benefit of the testimony of the notary from Pennsylvania, either in person or by deposition, and some local witnesses who are familiar with the testator's signature. In your decree you should state that the will is probated only for the purpose of disposing of personal property.

I regret very much that I am unable to uphold this will in its entirety.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

January 8, 1948.

Hon. L. H. Montgomery,
Judge of Probate,
Greene County,
Eutaw, Alabama.
Counties—Intoxicating liquors.

Courts of County Commissioners, and like county governing bodies, have no legal authority, in the absence of a local act, to prohibit the use of "juke boxes" in places where beer is sold outside of town limits.

Opinion by Assistant Attorney General Barton.

Dear Sir:

Your request for an official opinion, dated December 2, 1947, is as follows:

"Please advise me whether or not the Commissioner's Courts have the authority to prohibit the use of Juke boxes in places where beer is sold outside of the town limits."

In answering your question, your attention is first drawn to the fact that a county is but a governmental agency possessing no power and subject to no duty not originating from the law by which it is created, and in which its functions are defined. Whatever power may be delegated to the county is the power of the state, and its nature is not changed by the delegation. *Tuscaloosa County v. Alabama Great Southern R. Co.*, 227 Ala. 428, 150 So. 328; *Rhodes v. Marengo County Bank*, 205 Ala. 667, 80 So. 850.

Therefore, courts of county commissioners, boards of revenue and like governing bodies are courts of strictly limited jurisdiction and can exercise only such powers as are conferred upon them by statute. *Ensley Motor Car Co. v. O'Rear*, 196 Ala. 481, 71 So. 704; Biennial Report of Attorney General, 1934-36, page 744. Their general powers and authority are defined by Title 12, Section 12, Code of Alabama 1940, as amended by Act No. 344, General Acts 1945, page 560, approved July 6, 1945.

Counties have no inherent jurisdiction to make laws. *Tuscaloosa County v. Alabama Great Southern R. Co.*, supra; *Hill v. Moody*, 207 Ala. 325, 93 So. 422. Under our system of laws the legislative power of this state is vested in the Legislature. Constitution of Alabama 1901, Section 45. While the legislative power may to a limited extent be delegated to counties and municipalities, I find neither in the aforesaid statutory definition of the county governing body's general powers and authority, nor in any other statute, a delegation of the legislative function with respect to the enactment by wet counties of local laws, ordinances and regulations with respect to the conditions of sale and consumption of intoxicating liquors. Regulatory power in this respect appears to be delegated to the Alcoholic Beverage Control Board. See Title 29, Section 6, Code of Alabama 1940.

I therefore am of the opinion that, in the absence of a local act passed by the Legislature, a court of county commissioners, or other county governing body, does not have legal authority to prohibit the use of "juke boxes" in places where beer is sold outside of the town limits. Since your question is limited to the authority of a county governing body, I express no opinion on the question whether a municipality may so regulate within its corporate limits and within its extended police jurisdiction.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

January 8, 1948.

Hon. Floyd Forman,
Chairman, Macon County Board of Revenue,
Tuskegee, Alabama.
Counties—Funds

1. County Board of Revenue is without authority to donate county funds to a private organization for recreational purposes. Constitution of Alabama 1901, Section 94.

2. County funds cannot be appropriated for recreational purposes unless and until there has been created a Recreation Board. Act No. 350, General Acts 1945, page 565.

Opinion by Assistant Attorney General Barton.

Dear Sir:

Your request for an official opinion, dated November 10, 1947, is as follows:

"The Macon County Board of Revenue has authorized me as its chairman to request an opinion from you relative to the following statement of facts:

"An organization is attempting to establish a Teen-age Center for the Negro youth of this community and need funds for its development. The organization is no part of the City, County or school system of this County but is composed of a group of individuals seeking to establish a Center for the recreation purposes of the children.

"Please advise us whether or not the Macon County Board of Revenue is authorized to make a donation to this organization to assist in establishing such a Center."

In this connection the mandate of the Constitution of Alabama 1901, Section 94, must be considered. That section reads:

"The legislature shall not have power to authorize any county, city, town, or other subdivision of this state to lend its credit, or to grant public money or thing of value in aid of, or to any individual, association, or corporation whatsoever, or to become a stockholder in any such corporation, association, or company, by issuing bonds or otherwise."

Under this section I have held that a Chamber of Commerce is an association within the meaning of this section and that a city or county is without authority to donate public funds to a Chamber of Commerce. Quarterly Report of Attorney General, Vol. 35, pages 7 and 84; Quarterly Report of Attorney General, Vol. 39, pages 32 and 65. I am therefore of

the opinion that this Section prohibits the donation of county funds to a private organization for recreational purposes.

The only statutory authority for an appropriation by a county governing body for the establishment of a recreation center is contained in Act No. 350, General Acts 1945, Page 565, approved July 6, 1945, which authorizes the county governing body, through the establishment of a Recreation Board, to provide recreation facilities and services.

It will be noted from Act No. 350, supra, that such facilities and services can be provided only after the creation of and through the medium of a Recreation Board. In a previous ruling I have expressed the opinion that, when county funds are sought to be devoted to recreational purposes, the terms of Act No. 350, supra, must be complied with and a Recreation Board established. See Quarterly Report of Attorney General, Vol. 46, Page 149.

I am therefore of the further opinion that, in the absence of the creation and establishment of a Recreation Board, in the manner prescribed by Act No. 350, supra, the County Board of Revenue has no legal authority to appropriate county funds for recreational purposes.

Very truly yours,

A. A. CARMICHAEL,
Attorney General.

January 8, 1948.

Hon. John R. Coffman,
Ex-Officio Clerk,
Limestone County Court,
Athens, Alabama.

Costs and Fees—Game and Fish Laws—Informer's Fees—Department of Conservation—Courts.

1. Before claiming an informer's fee under the provisions of Act No. 296, General Acts 1945, page 493, the officer must be nonsalaried and must furnish the information resulting in the conviction of the violator.

2. When it appears in the judgment entry of the county court that the sheriff is entitled to an informer's fee for a violation of the game and fish laws, it must be assumed that the court had sufficient facts before it to enter such judgment.

Opinion by Assistant Attorney General Sykes.

Dear Sir:

Your request for an official opinion bearing date of November 18, 1947, is as follows:

"A very serious controversy has developed between myself as Ex-Officio Clerk of the Criminal Division of the Limestone County Court and the State Examiners of Public Accounts, regarding the disposition of certain fines assessed and collected in eleven cases involving a violation of the Game and Fish Laws. I submit below the facts:

"A Deputy Game Warden supplied information of a suspected violation of the Game & Fish Law by a party of eleven. He asked John G. Sandlin, Sheriff of Limestone County, Alabama, for a deputy sheriff to go with him in making the arrest, due to the large number of suspected offenders. Sheriff Sandlin sent a deputy sheriff with the Game Warden and that deputy was present and actively assisted in arresting the Defendants. The writs of arrest, bonds and complaints filed in the case are all in the name of the Deputy Game Warden. Neither Sheriff Sandlin nor his deputy's name appear in the complaint, writs or bonds on file.

"On August 28, 1947, upon pleas of guilty, the Judge of the Limestone County Court, assessed a \$25.00 fine and costs against each of eleven defendants who had been arrested by a deputy State Game Warden whose salary is paid by the State. Each of the eleven defendants then paid the fine and costs as assessed by the Trial Judge, for which I issued proper receipts to cover such fine and costs. The writs of arrest in each case disclose that J. B. Tanner, as Game Warden, made the arrests and permitted each to give bond for appearance at trial on the date set, and none of the complaints or the writs of arrest indicated that any one else had anything to do in connection with these arrests, and, it was my original intention to remit all of the fines and all of the fees to the Department of Conservation as required under Section 55, Title 8 of the Code, as amended by Act No. 296 (General Acts, 1945, Page 493), approved July 7, 1945, but I was told by Mr. J. B. Tanner that it was the desire of his Department that one-half of the fine in each of the eleven cases be paid over to Hon. John G. Sandlin, Sheriff of Limestone County, as an informer's fee, for aiding and assisting the said Game Warden, Mr. J. B. Tanner, in making these arrests. Acting under this advice, I paid over to Sheriff Sandlin one half of the fines, but none of the fees. All of the fees and one half of the fines were paid over to the Department of Conservation.

"The original judgment entry in each of said cases read as follows: 'Aug. 28, 1947. Defendant in open Court pleads guilty to the charge, is adjudged guilty by the Court and as a punishment, the Court assesses a fine of \$25.00 and costs.'

"The Judge of said Court has added the following judgment entry in each of said cases: 'Nov. 18, 1947. It appearing to the Court that an informer's fee of one half of the fine in this case was due the Sheriff of this County and the Clerk of this Court having paid one half of said fine to said Sheriff, his act in so doing

is hereby authorized, ratified and approved, and the judgment is amended nunc pro tunc accordingly.'

"It is the contention of the State Examiners of Public Accounts that all of the fines and all of the fees should have been remitted to the Department of Conservation, and that I was without legal authority to pay any part of the fines over to Sheriff Sandlin or to any one else, since the arrests were made by a Game Warden whose salary is paid by the State.

"Based upon the facts as given above, please render to me your official opinion whether or not there was any legal authority for me, as Ex-Officio Clerk of the Limestone County Court, either under the provisions of Section 55, Title 8, of the Code as last amended, or under any other statute, local or general, to pay over to the Sheriff of Limestone County, or to any one else, one half of the fines collected in these eleven cases.

"I will greatly appreciate this information, at the earliest possible time."

Since there is a conflict in the statement of facts in your inquiry, this opinion must assume which facts are correct.

In an opinion of this office rendered to Hon. Bert E. Thomas, Director of Conservation, under date of January 6, 1948, I advised the Department of Conservation that a salaried deputy sheriff could not claim the informer's fee provided by Act No. 296, General Acts 1945, page 493, approved July 7, 1945, for the reason that only a nonsalaried officer may claim the informer's fee.

Your request presents a different statement of facts. Under your statement of facts, a salaried game warden furnished the information leading to the arrest and conviction and actually performed the arrest himself, while the sheriff or his deputy accompanied the game warden, since the number of defendants was large. It is stated as a matter of fact in your inquiry that the deputy game warden supplied the information, and I assume that neither the sheriff nor his deputy furnished the information.

Clearly, the officer entitled to the informer's fee must not only be a nonsalaried officer, but must furnish the information which results in a conviction. Act No. 296, supra, Section 1. As stated in your inquiry, neither the sheriff nor the deputy sheriff of Limestone County furnished this information and would not be entitled to the informer's fee. However, your inquiry further states that the judge of your county court has entered a judgment dated November 18, 1947, as follows: "It appearing to the Court that an informer's fee of one half of the fine in this case was due the Sheriff of this County and the Clerk of this Court having paid one half of said fine to said Sheriff, his act in so doing is hereby authorized, ratified and approved, and the judgment is amended nunc pro tunc accordingly."

Such judgment having been entered by the county court, I must assume that the county court had sufficient facts before it to enter such judgment. I must assume it was proved to the county judge that the sheriff or his deputy made the arrest, that such officer was nonsalaried, and that said officer furnished the information resulting in a conviction.

As long as this judgment remains on the records of the county court, you correctly paid the informer's fee to the sheriff. If the other facts stated in your inquiry are true, the judgment entry should be revised.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

January 8, 1948.

Hon. Howard Kirby,
Clerk, Circuit Court,
Etowah County,
Gadsden, Alabama.

Clerks—Costs and Fees—Fee for issuing notice—Fine and Forfeiture Fund of the County.

1. Clerk entitled to claim from fine and forfeiture fund of the county fee for issuing notice when defendant convicted of a felony and sentenced to penitentiary when such fee is not paid by the Department of Corrections and Institutions and execution has issued against the defendant and returned "no property found."

Opinion by Assistant Attorney General Sykes.

Dear Sir:

Your request for an official opinion bearing date of November 22, 1947, is as follows:

"Please refer to Sections 260-261-262-263 of Title 15 of the 1940 Code of Alabama and render to me your opinion on the following matter.

"In felony cases where Information is filed by the Circuit Solicitor against defendants, a notice is issued by the Circuit Clerk to the defendant and his counsel and a copy served on each by the Sheriff.

"The law relating to fees allowed Circuit Clerks in Criminal cases provides a fee for issuing any Scire Facias or Notice.

"Since the State Department of Corrections and Institutions will not pay fees for issuing any Scire Facias or notice in the nature

thereof, wouldn't I as Clerk be entitled to file claim against the Fine and Forfeiture Fund of my county for the fees allowed by law for issuing Scire Facias or Notice in such cases as stated above, when defendants are placed on probation after plea of guilty and not required to pay any costs, and also in those cases where defendants are sent to the Penitentiary of Alabama?"

You are advised that you, as clerk, will be entitled to claim your fee for issuing a notice from the fine and forfeiture fund of the county.

When the defendant files a plea of guilty under the provisions of Title 15, Section 263, Code of Alabama 1940, a notice should issue. Title 15, Section 263, Code of Alabama 1940.

If the defendant is convicted of a felony and is committed to the penitentiary, the Department of Corrections and Institutions is not required to pay a fee to the clerk for issuing such notice. Title 45, Section 69, Code of Alabama 1940, as amended by Act No. 57, General Acts 1945, page 58, approved June 1, 1945. In such event, the clerk would be entitled to claim this fee from the fine and forfeiture fund of the county. Title 15, Section 392, Code of Alabama 1940; Title 11, Section 83, Subsection (d), Code of Alabama 1940. Of course, execution should issue against the defendant and be returned "no property found" before claim is made on the fine and forfeiture fund of the county. Title 15, Section 393, Code of Alabama 1940; Title 11, Section 83, Code of Alabama 1940.

If the defendant is placed on probation after a plea of guilty and is not required as a condition of probation to pay costs, it is my judgment that the clerk may claim the amount of the fee for issuing the notice referred to in your inquiry from the fine and forfeiture fund when execution has issued against the defendant and has been returned "no property found." Title 15, Section 393, Code of Alabama 1940; Title 11, Section 83, Code of Alabama 1940.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

January 8, 1948.

Hon. D. M. Weakley,
Superintendent,
Alabama Boys Industrial School,
Birmingham 6, Alabama.

Alabama Boys Industrial School—Schools—Appropriations.

Funds appropriated to the Alabama Boys Industrial School under the provisions of Act No. 247, General Acts 1939, page 411, "for erection of buildings and to purchase or complete the purchase of lands" may be expended for building an apartment

building or for converting an existing building into rooms. Said funds may be used for building a cow shed, but may not be used for repairing any of the existing buildings.

Opinion by Assistant Attorney General Kohn.

Dear Sir:

Your request for an official opinion, bearing date of December 3, 1947, is as follows:

"We have an unexpended balance of an appropriation that was made during the Dixon Administration. This appropriation was for the erection of buildings and to purchase or complete the purchase of lands (Acts No. 247, S. 239, approved August 24, 1939, General Acts 1939, page 417).

"1. Please advise me if we can spend any of this money to build an apartment, or construct rooms in any of our existing buildings.

"2. Can any of this money be used to build a cow shed?

"3. Can any of this money be used for repairing any of the existing buildings?"

In my opinion, your first question should be answered in the affirmative.

Act No. 247, General Acts 1939, page 411, the statute referred to in your inquiry, provides, in part, as follows:

"Section 1. That there is hereby appropriated for the ordinary expenses of the Executive and Judicial Departments of the State, for the interest on the public debt, and for the public schools for each of the four fiscal years ending respectively September 30, 1940, September 30, 1941, September 30, 1942, and September 30, 1943, to be paid out of any monies in the State Treasury not otherwise appropriated the several sums of money hereinafter specified or so much thereof as may be necessary: * * * * * For erections of buildings and to purchase or complete the purchase of lands \$10,000.00, * * * * *

The expenditure for constructing an apartment building certainly comes within the provision of the Act, supra, for the erection of buildings. Of course, you realize that this apartment building must be used for school purposes and is not to be rented to the public. The authority to erect an apartment building impliedly carries with it the right to remodel an existing building into rooms to be used for living quarters. See opinion of this office to you under date of May 29, 1947, found in Quarterly Report of Attorney General, Vol. 47, page 117, which holds

that you may use these funds for converting a building on the school grounds into a library.

In my opinion, your second question should be answered in the affirmative.

A cow shed is a building within the provisions of that part of Act No. 247, supra, which provides funds for the erection of buildings. See opinion of this office to you under date of July 6, 1942, found in Quarterly Report of Attorney General, Vol. 28, page 29, which holds that you may use these funds for the erection of entrance gates to the school.

In my opinion, your third question should be answered in the negative. See opinion of this office to you under date of November 10, 1939, found in Quarterly Report of Attorney General, Vol. 17, page 225, which holds that none of the funds referred to in your inquiry may be used for repairing any buildings belonging to the school.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

January 8, 1948.

Hon. John E. Mandeville,
Clerk of Circuit Court,
Mobile County,
Mobile, Alabama.

Solicitors—Costs and Fees—Conspiracy—Alabama Beverage Control Act.

A conviction of "Conspiracy to Violate the Alabama Beverage Control Act" is not a violation of the provisions of the Alabama Beverage Control Act or the prohibition law, but comes within the purview of Title 14, either Sections 100 or 101, Code of Alabama 1940, making such a conspiracy a misdemeanor.

The solicitor's fee chargeable in such a case is \$10.00 under that part of Title 11, Section 85, Code of Alabama 1940, providing for the solicitor's fee in cases of a conviction of a misdemeanor not otherwise provided for.

Opinion by Assistant Attorney General Screws.

Dear Sir:

Your request for an official opinion, bearing date of January 2, 1948, is as follows:

"Your opinion is requested in reference to the following matter:

"John Doe was indicted by the Grand Jury of Mobile County, Alabama, for Conspiracy to Violate the Alabama Beverage Control Act. On the date his case was set for trial the Defendant plead guilty. As you know, Mobile County is a wet county. What Solicitor's Fee should be charged by the Clerk of the Circuit Court in this type of case?"

In answer to your inquiry, it is my opinion that the proper solicitor's fee chargeable is \$10.00 under that part of Title 11, Section 85, Code of Alabama 1940, providing for the solicitor's fee in cases of a conviction of a misdemeanor not otherwise provided for.

The solicitor's fee in prosecutions for violations of the Alabama Beverage Control Act is the same as in prosecutions for violation of the prohibition law.—Biennial Report of Attorney General, 1936-38, page 388.

Title 11, Section 85, *supra*, provides in pertinent part as follows:

"§85. Solicitors' fees.—The following solicitors' fees shall be taxed against the defendant on conviction, to be collected as other costs, and paid into the county or state treasury, as may be authorized or required by law:

"For each conviction of a misdemeanor, not otherwise provided for \$ 10.00
 " * * * * *

"For each conviction of any law prohibiting the keeping, sale, or having in possession, spirituous, vinous, or malt liquors, not herein otherwise provided for 30.00
 " * * * * *

"For each conviction for the violation of any law, prohibiting or regulating the sale, barter, or exchange of spirituous, vinous, or malt liquors, or intoxicating drinks 30.00"

A conviction for "Conspiracy to Violate the Alabama Beverage Control Act," in my opinion, is not the same as a conviction for violating the Alabama Beverage Control Act or the prohibition law; and, consequently, the solicitor's fee of \$30.00 does not attach. It is a separate and distinct offense cognizable under Title 14, either Sections 100 or 101, Code of Alabama 1940, as the case may be. These sections provide as follows:

"§100. Conspiracy to commit felonies not named in section 99.—Any two or more persons, conspiring together to commit a felony, not named in section 99 of this title, shall each, on conviction, be fined not more than one thousand dollars, and may also be imprisoned in the county jail, or sentenced to hard labor for the county, for not more than six months."

"§101. Misdemeanor; conspiracy to commit.—Any two or more persons, conspiring together to commit a misdemeanor, shall each, on conviction, be fined not more than five hundred dollars, and may also be imprisoned in the county jail or sentenced to hard labor for the county for not more than three months."

See Quarterly Report of Attorney General, Volume 47, page 103.

Since the offense in question is a separate and distinct misdemeanor for which no specific solicitor's fee is provided, the \$10.00 fee attaches under the provisions of the first quoted portion of Title 11, Section 85, *supra*. The fact that the offense was committed in a "wet" county is immaterial.

The above holding is in accord with the former rulings of this office holding that the \$10.00 solicitor's fee attaches in cases of convictions of attempts to violate the prohibition law.—Quarterly Report of Attorney General, Volume 20, page 259, and opinions cited therein.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

January 9, 1948.

Hon. Ralph P. Eagerton,
Chief Examiner,
Department of Examiners of Public Accounts,
Montgomery 4, Alabama.

Agricultural Center Board—Appropriations—Livestock Coliseum.

1. The Act creating the Agricultural Center Board (Act No. 282, General Acts 1945, page 447) and appropriating \$25,000.00 and made effective only upon the building and construction of the State Agricultural Center, allows disbursement out of said funds for per diem and expenses for members of the Board performing preliminary work before the actual building of the State Coliseum.

2. The appropriation of \$200,000.00 provided for in Act No. 286, General Acts 1945, page 473, may be used only for allotments to counties and municipalities, and not for expenses of the Agricultural Center Board.

Opinion by Assistant Attorney General Sykes.

Dear Sir:

Your request for an official opinion bearing date of November 21, 1947, is as follows:

"You are respectfully requested to furnish me an official opinion as to Classification of disbursements of funds in the hands of the Agricultural Center Board.

"Act No. 282, Page 447, General Acts 1945, appropriates from the General Fund \$25,000.00 for each of the fiscal years ending September 30, 1946 and September 30, 1947 to be used for the payment of the expenses and salaries of the board and its employees and operation and maintenance of the facilities of the Agricultural Center.

"Section 8 of this Act reads in part 'This act shall become effective only upon the building and construction by the Building Commission of facilities to be used as an Agricultural Center as hereinabove provided.'

"The Building Commission on July 11, 1946, allotted \$500,000.00 for construction of the Livestock Coliseum.

"The Agricultural Center Board was organized and begun to function.

"Act No. 286, Page 473, General Acts 1945, appropriated from the Agricultural Fund a sum not to exceed \$200,000.00 for the purpose 'of aiding in the constructing and equipping by counties and municipalities of facilities suitable for housing fat livestock shows, agricultural and industrial displays and other exhibits consistent with the public good.'

"Does the board have authority to disburse any of the funds provided for in Act No. 282 before building and construction of facilities as provided for in Section 8?

"If you rule that disbursements may be made from this fund before building and construction of facilities, will you please define the limitations for which these funds may be expended by distinguishing these funds from the funds authorized under Act No. 286?"

In my judgment, Act No. 282, General Acts 1945, page 447, approved July 7, 1945, authorizes disbursements from the appropriation of \$25,000.00 in Section 5 of said Act, before the building and constructing of the facilities referred to in Section 8 of the Act.

Act No. 282, *supra*, creates the Agricultural Center Board and provides for its membership and its powers. The Act further provides for the per diem and traveling expenses of the members of the Board. Act No. 282, *supra*, Section 1. The Board is further given the power to lease its facilities and make a charge therefor. It may employ an executive officer and pay his salary. Section 5 of Act No. 282, *supra*, appropriates \$25,000.00 "for the further payment of the expenses and salary of the Board and its employees, and the cost of operation and maintenance of the facilities of the Agricultural Center. . . ." The Agricultural Center Board is further authorized to act in an advisory capacity with the Alabama Building Commission as to the types of structures, equipment, and location of the Agricultural Center. Section 8 of Act No. 282, *supra*, provides as follows:

"Section 8. This act shall become effective only upon the building and construction by the Building Commission of facilities to be used as an Agricultural Center as hereinabove provided; provided, however, that upon the allotment by the Building Commission of the necessary funds for the construction of the Agricultural Center, the Governor shall have the authority to appoint the Board hereinabove created."

As stated in your inquiry, the Building Commission, on July 11, 1946, allotted \$500,000.00 for the construction of the State Livestock Coliseum, pursuant to Schedule XXI of Act No. 128, General Acts 1945, page 116, approved June 16, 1945.

Such allotment having been made, the Governor was authorized to appoint the members of the Agricultural Center Board, as provided for in Act No. 282, supra. Clearly, the Board has numerous duties to perform before the "building and construction" of the coliseum by the Building Commission. The Board must consult with the Building Commission as to the type of structure, the equipment, and location of the State Agricultural Center. It must also allot the funds provided in Act No. 286, General Acts 1945, page 473, approved July 7, 1945. See Quarterly Report of Attorney General, Vol. 45, page 21.

In my judgment, and since the Agricultural Center Board has many duties to perform before the actual building and construction of the State Coliseum, it is my opinion that the legislature did not intend to withhold the appropriation made in Section 5 of Act No. 282, supra, until the completion of the coliseum. It is my opinion that Section 8 of Act No. 282, supra, has reference to activities of the Board provided in Act No. 282, such as the payment of the salary of an executive officer or coliseum superintendent, and the distribution of collections made for the use of the coliseum.

It is further my opinion that Section 8 of Act No. 282, supra, does not prohibit the disbursement out of the appropriation made in Section 5 of said Act of the per diem and expenses of the members of the Board, when such members are meeting for the purposes of attending to preliminary matters, such as conferring with the Building Commission on the type of structure, equipment, or location of the State Agricultural Center, or other business, which must be performed prior to the building of the State Coliseum; for example, a meeting for the allotment of funds provided for in Act No. 286, supra.

You are advised, therefore, that the per diem and expenses of the members of the Board may be paid out of the \$25,000.00 appropriation above referred to before the building of the State Coliseum.

You are further advised that the appropriation of \$200,000.00 in Act No. 286, supra, may be used only for allotments to municipalities (counties or municipalities), and may not be used for expenses of the members of the Agricultural Center Board. This appropriation is to be used

"exclusively for the purpose of aiding in the constructing and equipping by counties and municipalities of facilities suitable for housing fat live-stock shows, agricultural and industrial displays, and other exhibits consistent with the public good." Act No. 286, supra; Quarterly Report of Attorney General, Vol. 45, page 21.

If you have any specific disbursement requested to be made from the appropriation in Act No. 282, supra, please advise me, and I will be glad to give you my opinion.

Very truly yours,

A. A. CARMICHAEL,
Attorney General.

January 9, 1948.

Dr. D. G. Gill,
State Health Officer,
Department of Public Health,
C A P I T O L.

Health and Health Department—Hospitals—Appropriations.

1. When the maximum allocation of \$135,000.00 has been made by the State Building Commission for constructing and equipping a tubercular sanatorium under the provisions of Act No. 287, General Acts 1945, page 474, and said sum is not as much as one-third of the total cost of the sanatorium, an allocation may be made by the State Board of Health to such sanatorium under Act No. 484, General Acts 1947(Ms.), approved September 29, 1947, so that the allocations under Act No. 287, supra, and Act No. 484, supra, will equal one-third of the cost of constructing the sanatorium under consideration.

2. Under the provisions of Act No. 484, supra, the State Board of Health may make an allocation of funds to a public nonprofit tubercular sanatorium from the conditional appropriation made to it under the provisions of said Act, when such appropriation becomes available, without securing an allocation from the State Building Commission under the provisions of Act No. 287, supra.

Opinion by Assistant Attorney General Arbuthnot.

Dear Sir:

Your request for an official opinion bearing date of November 13, 1947, is as follows:

"Section 1 of Act 287 of the 1945 Legislature (General Acts, Alabama Regular Session, 1945, pages 474-477), in providing for

the construction and equipment of District Tuberculosis Sanatoria, specifies that 'on approval of the State Committee of Public Health, the State of Alabama may contribute not to exceed three-fourths of the construction cost of each sanatorium not including the cost of the building site, and provided such state participation does not exceed the sum of One Hundred and Eighteen Thousand Dollars (\$118,000.00) per institution.' Section 1 of the Act referred to provides further that 'on the approval of the State Committee of Public Health, the State of Alabama may contribute not to exceed three-fourths of the cost of equipment of each sanatorium provided such State participation does not exceed the sum of Seventeen Thousand Dollars (\$17,000.00) per institution'—the total grant of \$135,000 to be allocated, allotted, and released by the Alabama Building Commission.

"Act 484 of the 1947 Legislature, approved September 29, 1947, in Section 2, states that 'conditional upon the condition of the Treasury and the approval of the Governor, there is appropriated to the State Board of Health in each of the fiscal years ending September 30, 1948, and September 30, 1949, out of the State General Fund, the sum of three million dollars (\$3,000,000.00), to be known as the 'Hospital and Planning Construction Fund.' Paragraph (b) of Section 3 of this Act, in setting forth the method of allocation of any monies that might become available from this conditional appropriation, specifies that 'state assistance to any public hospital association or non-profit organization' (see Act 211, General Acts, 1945, pages 330-336) 'shall be limited to one-third (1/3) of the actual cost of the facility to be constructed.'

"With these two Acts of the Legislature before you, it is respectfully requested that you give me your opinion (1) as to whether a given tuberculosis sanatorium could participate in both appropriations, provided the \$135,000.00 set up in Act 287 for construction and equipment is not as much as one-third of the total cost of these items, as provided in Act 484; and (2) granting money becomes available from the conditional appropriation under Act No. 484, supra, could a grant to an institution for the tuberculosis be limited to Act No. 484 to the exclusion of Act 287, thus likely assuring it of a larger allotment than \$135,000.00?

"In giving consideration to this question, it will be recalled that the conditional appropriation of the 1947 Legislature was the outgrowth of efforts on the part of the State Department of Health to procure money to be used in connection with a Federal grant to Alabama for the construction of hospitals of all types, including tuberculosis sanatoria; and that Act 211, referred to above, authorized the State Board of Health to construct . . . public hospitals for the treatment of any type of disease."

To restate your first inquiry, the question is: Whether or not when the maximum allocation of \$135,000.00 has been made by the State Building Commission for constructing and equipping a tubercular sana-

torium under the provisions of Act No. 287, General Acts 1945, page 474, and said sum is not as much as one-third of the total cost of the sanatorium, an allocation may be made under Act No. 484, General Acts 1947 (Ms.), approved September 29, 1947, so that the allocations under Act No. 287, supra, and Act No. 484, supra, will equal one-third of the cost of constructing the sanatorium under consideration.

For example: If the total cost of the tubercular sanatorium is \$600,000.00 and the State Building Commission has allocated \$135,000.00 under the provisions of Act No. 287 to the sanatorium, may an allocation of \$65,000.00 be made to such sanatorium under Act No. 484, making the total allocation under both Acts \$200,000.00—one-third of the total cost?

Under the provisions of Act No. 287, the State Building Commission, with the approval of the State Committee of Public Health, may allocate to a tubercular sanatorium an amount not to exceed three-fourths of the cost of construction not including the building site, provided such allocation does not exceed \$118,000.00. An allocation may also be made under said act for the purpose of equipping such sanatorium, provided such allocation does not exceed \$17,000.00. Thus the maximum amount that may be allocated for constructing and equipping any particular tubercular sanatorium is \$135,000.00.

Under the provisions of Act No. 211, General Acts 1945, page 330, "The State Board of Health is hereby authorized and empowered to acquire, construct, equip, maintain, and operate public hospitals, health centers, and related facilities for the treatment of any type of disease. The State Board of Health is authorized and empowered to cooperate and to make contract with the United States Government, any local political subdivision or their agencies, any non-profit association or public improvement society in the acquisition, building, equipping, maintaining and operation of any public hospitals, health centers, and related facilities for the treatment of any type of disease." The term "hospital" as defined in said Act includes tubercular hospitals.

Act No. 211, supra, contains no direct appropriation to the State Board of Health for the construction of hospitals, but provides that "for the purposes of construction funds may be allocated by the State Building Commission."

Act No. 484, supra, provides in part as follows:

"Section 1. The purpose of this act is to provide funds to the State Board of Health for the planning and construction of State-owned and other public and nonprofit hospitals in Alabama. The Act may be cited as the 'Hospital Planning and Construction Act of 1947.'

"Section 2. Conditional upon the condition of the Treasury and the approval of the Governor, there is appropriated to the State Board of Health in each of the fiscal years ending September 30,

1948 and September 30, 1949, out of the State General Fund, the sum of three million dollars (\$3,000,000.00), to be known as the 'Hospital and Planning Construction Fund.' This appropriation is in addition to all other appropriations made to the State Board of Health, which shall have authority to utilize, allocate and expend the funds for the planning and construction of State-owned and other public and nonprofit hospitals in Alabama.

"Section 3. Allocation of funds by the State Board of Health to public hospital associations and non-profit organizations for the purpose of constructing public and nonprofit hospitals shall observe the following: (a) Priority shall be given to applications from those areas now devoid of hospital facilities or more deficient in such facilities than other areas. (b) State assistance to any public hospital association or non-profit organization shall be limited to one-third (1/3) of the actual cost of the facility to be constructed.

"Section 5½. The appropriation herein provided for in Section 2 of this Act shall be subject to the approval of the building Commission created by Act 128, page 116, General Acts of 1945."

The title to Act No. 484 states that it is "Supplemental to Act 211, approved July 7, 1945."

It will be seen from Section 2 of Act No. 484 that if the appropriation is released, the State Board of Health has authority to allocate and expend such funds for the planning and construction of State-owned and other public and nonprofit hospitals, subject to the approval of the Alabama Building Commission. Under Section 3 of the Act, the allocation to any given public hospital association or nonprofit organization is limited to one-third of the actual cost of the facility to be constructed.

Inasmuch as under the provisions of Act No. 484 the State Board of Health may allocate funds from the appropriation made thereby for the purpose of constructing a public nonprofit hospital, subject to the limitation that such allocation shall not be in excess of one-third of the cost of such hospital, it is my opinion that the State Board of Health has authority under said Act to allocate funds for the construction of a tubercular sanatorium to be constructed under the provisions of Act No. 287 (a public nonprofit hospital), provided the total amount of the allocations under Act No. 287 and Act No. 484 does not exceed one-third of the cost of constructing the sanatorium under consideration. In other words, if the total cost of the tubercular sanatorium is \$600,000.00 and the State Building Commission has allocated \$135,000.00 under Act No. 287 to the sanatorium, the State Board of Health may allocate \$65,000.00 to the sanatorium from the appropriation provided for in Act 484, making the total allocation under both Acts \$200,000.00—one-third of the total cost.

To restate your second inquiry, the question is: Whether or not, if the conditional appropriation provided in Act No. 484, supra, becomes

available may an allocation from such appropriation be made by the State Board of Health to a public nonprofit tubercular sanatorium, subject to the limitation that such allocation shall not exceed one-third of the actual cost of the sanatorium as provided in said Act, without obtaining an allocation from the State Building Commission under the provisions of Act No. 287, supra, for the purpose of constructing and equipping said sanatorium, thus likely assuring to it a larger allotment than \$135,000.00.

As stated in answering your first inquiry, under the provisions of Act No. 484, supra, the State Board of Health may allocate funds from the conditional appropriation provided therein for the construction of a limitation that the allocation shall not exceed one-third of the actual public nonprofit hospital, when such funds are available, subject to the cost thereof. Under this authority, it is my conclusion that the State Board of Health may make an allocation of funds to a public nonprofit tubercular sanatorium from the conditional appropriation made to it under the provisions of Act No. 484, when such appropriation becomes available, without securing an allocation from the State Building Commission under the provisions of Act No. 287.

It therefore follows that the answer to your second inquiry is in the affirmative.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

January 9, 1948.

Hon. Gordon Persons, President,
Alabama Public Service Commission,
Montgomery 1, Alabama.

Public Utilities—Alabama Public Service Commission—Corporations.

The Alabama Public Service Commission is authorized to request and receive a list of stockholders, common and preferred, of electric utility companies, and such electric utility companies should furnish to the Commission such list. Title 10, Section 32; Title 48, Sections 18, 23, 44, 55, 56, Code of Alabama 1940.

Opinion by Assistant Attorney General Sykes.

Dear Sir:

Your request for an official opinion bearing date of January 6, 1948, is as follows:

"Several weeks ago, the Commission ordered all electric and gas utilities to send to us, by December 15th., a list showing all of their common and preferred stock holders.

"All utilities, with the exception of the Alabama Power Company, immediately sent in their reports well within the prescribed date. However, the Alabama Power Company refused to send in such a list of their preferred stock holders, as per attached letter from Mr. C. A. Bingham, their Vice President and Treasurer.

"Section 18 of the 1940 Code gives to the Public Service Commission general supervision of public utilities and the right to inquire into the management, etc. Section 23 requires the utilities to obey the orders of the Commission. Section 44 requires utilities to file with the Commission such reports as the Commission might require. Section 56 gives the Commission the right to examine the books and records of utilities.

"After a personal conference with Mr. Thomas W. Martin, President of the Alabama Power Company, he stated that if you agreed that our order was in accordance with the general powers of the Public Service Commission Act, the Company would immediately send in the required report. As we would like to get the matter settled at once, we would appreciate your confirming, by letter, the opinion you gave to me over the telephone, in which you stated we were within our rights requesting such information."

In my opinion, an electric power company, which is a public utility, including the Alabama Power Company, should furnish to the Alabama Public Service Commission, upon its request, a list of stockholders, common and preferred.

Title 10, Section 32, Code of Alabama 1940, requires corporations to keep a register showing who are the holders of stock therein and all transfers of such stock.

Title 48, Section 18, Code of Alabama 1940, provides as follows:

"§18. Supervision of utilities.—The public service commission shall have general supervision of all persons, firms, corporations, operating utilities, mentioned in this title, shall inquire into the management of the business, and shall keep itself informed as to the manner and method in which the business is conducted. It shall examine such utilities as often as may be necessary to keep informed as to their general condition, their franchises, capitalization, rates and other charges, and the manner in which their plants, equipment and other property are owned, leased, controlled, managed, conducted, and operated, not only with respect to adequacy, security and accommodation afforded by their service, but also with respect to their compliance with the provisions of this title, and any other law or laws, with the orders of the commission, and with the charter and fran-

chise requirements. It shall assemble and keep on file, available for the use of the public, full statistics on the foregoing, as well as on all other matters or things connected with such utilities as is necessary to a full knowledge of their business and affairs. Provided, however, that nothing contained in this title shall be deemed to confer upon the commission, power and jurisdiction to regulate and supervise any utility owned and operated by any municipal corporation in the state."

Section 23 of the same title provides as follows:

"§23. Duty of utilities, etc., to obey orders of commission.—Every utility subject to the supervision of the public service commission, and all officers, agents, and employees of the same shall obey, observe, and comply with every order made by the public service commission under the authority of this title."

Title 48, Section 44, Code of Alabama 1940, provides as follows:

"§44. Utilities required to report to commission.—Every utility when and as required by the commission, shall file with the commission such annual, or other reports, and such other information as the commission may desire. The commission shall prepare and distribute to every utility blank forms for any reports required under this title."

Title 48, Sections 55 and 56, Code of Alabama 1940, provide, respectively, as follows:

"§55. Production of books, records and documents.—The commission, by order, may require any utility or any officer or agent thereof, to produce within the state, at such reasonable time and place as it may designate, any books, records, accounts, or documents kept in any office or place without or within the state, or certified copies thereof, whenever the production thereof is reasonable required and pertinent to any matter under investigation before the commission, in order that an examination thereof may be made by the commission, or by any person employed by the commission."

"§56. Inspection of books and records, plant and property of utility.—The commission shall examine and inspect, or cause to be examined and inspected at reasonable times and in a reasonable manner, under its authority, the books, records, accounts, documents, plant, property and facilities of any utility, whether there is any proceeding by or against the utility then pending before the commission or not. Every utility, its officers and agents shall make all its books, records, accounts and documents available at its principal office or place of business in this state, for examination and inspection by the commission or its authorized representatives or employees, whenever the commission may deem it in the public interest that such examination or inspection should be made. Every utility, its officers and agents, shall make available all and every part of

its plant, property and facilities for examination and inspection by the commission or its authorized representatives or employees, whenever the commission may deem it in the public interest that such examination or inspection should be made; and any person shall produce, when so required, his authority from the commission to make such examination or inspection under the seal of the commission."

It is my opinion that the foregoing statutes afford ample authority to support the commission's request to furnish a list of stockholders. It is further my opinion that all public utilities designated in the order should comply thereto promptly.

Very truly yours,

A. A. CARMICHAEL,
Attorney General.

January 12, 1948.

Honorable Ralph P. Eagerton,
Chief Examiner,
Department of Examiners of Public Accounts,
CAPITOL.

Clerks—Probation—Costs and Fees.

1. A circuit clerk is entitled to a fee of \$1.00 for keeping a probation docket.

2. The fee to which the clerk of the circuit court is entitled for keeping a probation docket is the same in Section 4 of Act No. 426, General Acts 1945, page 666, approved July 7, 1945, as that provided for in Section 2 of Act No. 375, General Act 1947 (Ms.), approved August 16, 1947, and should, when not collected from the probationer, be paid by the State Department of Corrections and Institutions.

3. That part of Section 4 of Act No. 426, supra, authorizing fee to clerk of \$1.00 for "forwarding the probation file in duplicate to the Board of Pardons and Paroles" is inoperative.

Opinion by Assistant Attorney General Sykes.

Dear Sir:

Your request for an official opinion bearing date of October 31, 1947, is as follows:

"You are respectfully requested to render an official opinion on the following:

"1. What fee or fees may the Clerk of the Circuit Court receive for his services in probation cases?

"If you rule that the fee of \$1.00 for 'Docketing case on probation docket' which appears in Act No. 375, approved August 16, 1947 is in addition to fees authorized by General Acts 1945, No. 426, paragraph 4, page 670.

"2. Could this fee of \$1.00 be paid out of the funds of the State Department of Corrections and Institutions?

"If you rule that the fee of \$1.00 for 'Docketing case on probation docket' is intended to be the same fee as authorized in Act No. 426, General Acts 1945, paragraph 4, page 670.

"3. What effect, if any, would the ruling have as to the source from which the clerk would receive payment for his services?

"In rendering this opinion a restatement of the conclusions reached in your unpublished opinion addressed to Mr. E. P. Russell, Director, Department of Corrections and Institutions, dated January 29, 1946, would be of benefit to the Circuit Clerks and my department and would be appreciated."

You are advised that the clerk under the present law is now entitled to collect a fee of \$1.00 in probation cases for his services in keeping a probation docket. Act No. 426, General Acts 1945, page 666, approved July 7, 1945 (amending Title 42, Section 25, Code of Alabama 1940).

Before the passage and approval of Act No. 426, supra, the clerk was entitled to a fee of \$2.00 for all of his services in probation cases when the case was certified to his court from an inferior court. Quarterly Report of Attorney General, Vol. 36, page 59; Quarterly Report of Attorney General, Vol. 31, page 64.

Title 11, Section 90, Code of Alabama 190, provides as follows:

"§ 90. Clerks fees in probation cases.—The clerks shall be allowed a fee of two dollars for all of his services in probation cases certified from an inferior court to the circuit court or other court from which an appeal lies directly to the court of appeals or supreme court, which if not paid by the probationer shall be payable out of the funds of the department of corrections and institutions as other such court costs are now paid."

Title 42, Section 20, Code of Alabama 1940, concluded in substantially the same language:

"... The clerk shall be allowed a fee of two dollars for all of his services in probation cases certified to the circuit court or inferior court from which an appeal lies directly to the court of appeals or supreme court, which if not paid by the probationer shall be payable

out of the funds of the state department of corrections and institutions as other such court costs are now paid."

It is apparent, therefore, that the clerk of the circuit court or the clerk of an inferior court from which an appeal could be taken directly to the Court of Appeals or the Supreme Court was entitled to the fee of two dollars when a probation case was certified to him from a lower court.

Act No. 426, supra, amended Sections 20, 21, 24 and 25 of Title 42, Code of Alabama 1940. In amending Section 20, Act No. 426, supra, does not provide for a fee of two dollars. Since the legislature, in amending Section 20, supra, deleted that part of Section 20 which provided for a fee of two dollars, it is my opinion that this provision of law authorizing the two-dollar fee was repealed.

It is further my opinion that since Title 11, Section 90, Code of Alabama 1940, is substantially in the same language as the concluding sentence of Title 42, Section 20, Code of Alabama 1940, this section (Title 11, Section 90, Code of Alabama 1940) was also repealed. The provision for the two-dollar fee, which appears in Title 11, Section 90, Code of Alabama 1940, and Title 42, Section 20, Code of Alabama 1940, was taken from the same act, Act No. 278, General Acts 1939, page 434, approved August 24, 1939.

Having repealed the former provisions of law authorizing a fee of two dollars to clerks in probation cases, the legislature provided in Section 4 of Act No. 426, supra, as follows:

"... the Clerk of the Court, in addition to the usual fees now allowed him by law in criminal cases shall be allowed a fee of one dollar in each case for his services in keeping a probation docket and one dollar for forwarding the probation file in duplicate to the Board of Pardons and Paroles, all of which fees, if not paid by the probationer shall be payable out of funds of the State Department of Corrections and Institutions as other such court costs are now paid."

Therefore, the clerk is entitled to a fee of one dollar for keeping a probation docket. This is true whether the probation case is certified to the clerk from a lower court or whether the case originates in his court.

It is further my opinion that the clerk is not entitled to one dollar for forwarding the probation file in duplicate to the Board of Pardons and Paroles for the reason that the clerk is not now required to perform this service.

Section 2, of Act No. 426, supra, provides for a method of appeal in probation cases to the Court of Appeals of Alabama. Under the procedure outlined in Section 2, the clerk is required to forward the probation

file to the Board of Pardons and Paroles. This section of the Act, however, has been declared invalid by the Supreme Court of Alabama. In *Re Upshaw*, 247 Ala. 221, 23 So. 2d. 861.

It follows, therefore, that it is not the duty of the clerk to forward duplicate copies of the probation file to the Board of Pardons and Paroles. He cannot claim his fee since he performs no service.

You are, therefore, advised that in probation cases the clerk is entitled to a fee of one dollar for keeping the probation docket and that this fee is payable from the funds of the Department of Corrections and Institutions when not paid by the probationer.

You are further advised that the one dollar fee for "docketing case on probation docket" included in Section 2 of Act No. 375, General Acts 1947 (Ms.), approved August 16, 1947, is the same fee as that provided for in Act No. 426, *supra*. In Section 4 of Act No. 426, *supra*, in each case the legislature provided a fee to the clerk for keeping a probation docket. The two fees are the same and may be collected but once out of the funds of the Department of Corrections and Institutions.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

January 13, 1948.

Miss Siybl Pool,
Secretary of State,
CAPITOL.

Supreme Court and Court of Appeals Reports—Secretary of State.

Secretary of State not authorized to sell reports of the Supreme Court and Court of Appeals as provided by Title 55, Section 188, Code of Alabama 1940, as said Section has been modified and amended by Title 13, Sections 65, 67 and 68, Code of Alabama 1940.

Opinion by Assistant Attorney General Kohn.

Dear Miss Pool:

Your request for an official opinion, bearing date of November 25, 1947, is as follows:

"Section 188 of Title 55 of the 1940 Code apparently authorizes the Secretary of State to sell the reports of the decisions of the Supreme Court and the Court of Appeals. The price for reports which have not been published for more than one year must not

be less than \$2.50 per volume; older reports may be sold at the best price obtainable. Under the authority of this provision of law, I have been selling copies of old reports (123-242 Alabama) for one dollar per volume. I have kept on hand six copies of each volume for the use of the State.

"The publishers holding the contract made pursuant to Chapter 2, Article 7, Title 13 of the 1940 Code have challenged my authority to sell the extra copies of the reports held in my office.

"Your official opinion as to my authority is requested."

In answering your question, it is my opinion that you do not have authority to sell the reports of the decisions of the Supreme Court and the Court of Appeals as provided by Title 55, Section 188, Code of Alabama 1940, as this Section has been modified and amended by Title 13, Sections 65, 67 and 68, Code of Alabama 1940, which provides as follows:

"§ 65. Contract for printing and publishing reports provided for.—The director of finance with the approval of the governor, the auditor and the treasurer of the state may contract for the printing and publishing of the reports of the supreme court of Alabama and the court of appeals of Alabama, or for the reprinting or republishing of any one or more of the volumes of the Alabama reports, in the manner in which other like contracts are made with such bidder, within or without the State of Alabama, as shall seem to them the best and lowest responsible bidder, as to price and length of time. To the end that bids may be made more favorable to the state, the reporter shall furnish to the publisher without cost all copies of opinions, statements of facts and other matter required under contract with such published for the publisher's personal use."

"§ 67. Price of reports fixed by contract.—The price for which said reports are to be sold to the state, or to any person residing within the said state, by the publishers, shall be fixed by the contract."

"§ 68. Number of reports to be purchased.—The contract to be entered into shall not obligate the state to purchase any reports in excess of what may be deemed by the governor, the auditor and the treasurer of the state as necessary for the use of the officials and departments now being furnished with same under existing laws, for distribution on exchange with other states, or extra copies not to exceed fifty volumes. The said volumes of reports shall be distributed by the secretary of state as is authorized or may be provided by law."

The sections, supra, provide for a contract for the printing and publishing of the reports of the Supreme Court and Court of Appeals and that the contract shall contain the price that the State shall pay for

said reports, the number of volumes that may be purchased and also the price that said reports may be sold to any person residing in the State by the publisher. In my opinion, there is an apparent conflict between these sections and Section 188 which provides that the Secretary of State shall sell the reports.

In tracing the history of these sections, I find that Title 13, Sections 65, 67 and 68, Code of Alabama 1940, are of more recent enactment than Section 188, Code of Alabama 1940, and must be construed to modify and amend Section 188.

In 25 R. C. L. 925, § 175, it is said: "It has been held that where two inconsistent statutes are carried into the codified law, the one last passed, which is the latter declaration of the legislative will, should prevail." See *Adkins v. Arnold*, 235 U. S. 417, 35 S. Ct. 118, 59 U. S. (L. ed.) 294; *Hillsborough County v. Jackson*, 58 Fla. 210, 50 So. 423; 25 R. C. L. 925, Statutes, § 175, Note 16.

The foregoing rule of construction is followed by our own court of last resort. Where there is conflict, repugnancy or inconsistency between two provisions of law as they appear in the Code, the court will look to their history and origin and give effect to that provision which was last enacted by the legislature, as being the last expression of its will and intent. The later enactment will prevail over the earlier one in so far as the earlier act is in conflict with or inconsistent with the later enactment. *Calhoun County v. Watson*, 152 Ala. 554, 44 So. 702; *Zaner v. State*, 90 Ala. 651, 8 So. 698; *Gunter v. State*, 83 Ala. 96, 3 So. 600; *Steele v. State*, 61 Ala. 213; *O'Neal et al. v. Robinson*, 45 Ala. 526; *Ex Parte Ray and Defoe*, 45 Ala. 15.

Section 188 of the 1940 Code first appeared in the 1907 Code of Alabama as Section 580 and was brought forward in the 1923 Code as Section 785.

Sections 65, 67 and 68 were enacted in 1919 and first appeared in the 1923 Code as Sections 10335, 10337 and 10338. Section 10335 of the 1923 Code was amended in 1939. It, therefore, follows that Section 188, Code of Alabama 1940, has been modified and amended by Title 13, Sections 65, 67 and 68, Code of Alabama 1940.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

January 13, 1948.

Hon. Phillip J. Hamm,
Commissioner of Revenue,
State Department of Revenue,
Montgomery, Alabama.

Licenses—Vending Machines—Bottling Companies—Taxation.

1. Where a soft drink vending machine is located in a place of business where soft drinks are sold from ice boxes or otherwise in addition to sales made from the vending machine, if the soft drink license levied under Title 51, Section 482, Code of Alabama 1940, has been obtained by the person, firm or corporation operating the place of business where such machine is located, the vending machine license levied under Title 51, Section 613, Code of Alabama 1940, as amended by Act No. 688, General Acts 1947 (Ms.), approved October 7, 1947, is not required.

2. Where a soft drink vending machine is located in a place of business and soft drinks are only sold through such vending machine, if the soft drink license levied under Title 51, Section 482, Code of Alabama 1940, has been obtained by the person, firm, or corporation operating the place of business where such machine is located, the vending machine license levied under Title 51, Section 613, Code of Alabama 1940, as amended by Act No. 688, supra, is not required.

3. A bottling company which owns and operates soft drink vending machines located in the lobbies of hotels, banks, etc., is operating the places of business where such machines are located. If the bottling company has taken out the soft drink licenses levied under Title 51, Section 482, Code of Alabama 1940, such bottling company is not required to take out the vending machine licenses levied under Title 51, Section 613, Code of Alabama 1940, as amended by Act No. 688, supra.

Opinion by Assistant Attorney General Arbuthnot.

Dear Sir:

Your request for an official opinion bearing date of October 30, 1947, is as follows:

"In this State there are many soft drink bottling companies that own and operate automatic soft drink vending machines.

"(1) These machines are located in established places of business where soft drink are sold from ice boxes or otherwise in addition to the sales that are made from the vending machines.

"(2) Other soft drink vending machines are located in established places of business that sell other types of merchandise in addition to the soft drinks that are sold through the vending machines, but no soft drinks are sold except those sold through the vending machines.

"(3) Other soft drink vending machines are located in the lobbies of hotels, doctors' offices, and other places where the public may enter, but where no sales of any other type of merchandise are made except the sales of soft drinks by means of the vending machines.

"In Class (1), if the proprietor of the established place of business has taken out a soft drink license under Title 51, Section 482, Code of Alabama 1940, is there an additional license due for the operation of such vending machine under the provisions of Act No. 688, General Acts Regular Session 1947, approved October 7, 1947.

"In Class (2), if the proprietor of the established place of business has taken out a soft drink license under Title 51, Section 482, Code of Alabama 1940, is there an additional license required for the operation of the vending machine under Act No. 688, General Acts Regular Session 1947, approved October 7, 1947?

"In Class (3), if the soft drink bottling company has taken out a soft drink license under Title 51, Section 482, Code of Alabama 1940, for each vending machine, is he thereby relieved from having to take out vending machine licenses under Act No. 688, General Acts Regular Session 1947, approved October 7, 1947; or is he required to take out licenses under said Act No. 688; or is he required to take out licenses for each machine under both said Section 482, and said Act No. 688?"

In answer to your first and second inquiries, your attention is called to an opinion of this office found in Quarterly Report of Attorney General, Vol. 19, page 136, in which it was held that no vending machine license was necessary for a vending machine located in a place of business where a privilege or dealer's license had been obtained by the operator of such place of business for the sale of the article vended by such machine. This opinion was based on a proviso contained in Schedule 154 of the Revenue Act of 1935 (Act No. 194, General Acts 1935, page 504), as amended by Act No. 398, General Acts of 1939, page 519, which proviso is as follows:

"Provided that no license shall be required under this schedule where a privilege or dealer's license is required by this Act for the sale of such articles and such privilege license shall have been obtained by the person, firm or corporation operating the place of business where such machine is located, or the owner of such vending machine shall have secured such privilege license as required herein."

This proviso now appears without material change in Title 51, Section 613, Code of Alabama 1940, as last amended by Act No. 688, General Acts 1947 (Ms.), approved October 7, 1947. There has been no change in the statute levying a license on vending machines since the above opinion was written that would alter the conclusion reached therein.

It is, therefore, my opinion that your first and second inquiries should be answered in the negative.

In answering the first question presented by your third inquiry, I assume that the vending machines under consideration are owned and operated by the bottling company.

In the opinion of the Attorney General cited above, it was said:

"The effect of this amendment (Act No. 398, supra which inserted into Schedule 154, supra, the above quoted proviso) is that the securing of the license levied by Schedule 128 (Title 51, Section 482, Code of Alabama 1940) for each person engaged in the business of selling at retail soft drinks, etc., now entitles such licensee to maintain a vending machine in his place of business without the necessity of securing an additional license for such vending machine."

In the case of *State v. Woods*, 242 Ala. 184, 5 So. 2d 732 (a case dealing with the vending machine license statute), the court said:

X "We may observe, as a matter of common knowledge, that many places of business rent space in their establishments to third persons who may and do conduct their own and different businesses in such space or department so rented. Such space or department becomes, and is, a separate place of business,—the business of such third party. If, therefore, a vending machine owner rents (method of payment immaterial) space for a vending machine and such space becomes his place of business (special or limited), in the conduct of his business he thereby makes himself * * * liable for the tax * * within the terms of the * * * vending machine statute in question." ✓

It is my conclusion that a bottling company which owns and operates vending machines located in the lobbies of hotels, banks, etc., is operating the place of business where such machines are located within the meaning of the above proviso. If the bottling company has taken out the soft drink licenses levied under the provisions of Title 51, Section 482, Code of Alabama 1940, such bottling company is not required to take out the vending machine licenses levied under Title 51, Section 613, Code of Alabama 1940, as amended.

It is my opinion that the first question presented by your third inquiry should be answered in the affirmative.

This conclusion makes it unnecessary to answer the second and third questions presented by your third inquiry.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

January 13, 1948.

Honorable Pat Byrne,
Commissioner of Licenses,
Mobile County,
Mobile, Alabama.

Licenses—License Inspector—Mobile County.

1. Payment of license tax levied on malt and brewed beverages by Mobile County under the provisions of Act No. 415, Local Acts 1947 (Ms.), approved September 25, 1947, mailed to the License Commisisoner on or before the 15th of the month, but not received by him until after the 15th of the month, is delinquent, and the taxpayer is subject to the penalty for delinquency imposed by Section 3(d) of said Act.

2. It is the duty of the License Inspector to collect the penalty for delinquency imposed by Section 3(d) of said Act.

Opinion by Assistant Attorney General Arbuthnot.

Dear Sir:

Your request for an official opinion bearing date of November 17, 1947, is as follows:

"I am enclosing herewith copy of Local Act approved September 25, 1947 (H. 703—Stone) No. 415.

"This office has been collecting this Beer Tax during the month of October and November, and our office closed at 12:00 Noon Saturday, November 15th. In Monday's mail, delivered to us Monday, November 17th, we received a number of reports with checks for payment of the Beer Tax, attached. One of these envelopes was postmarked November 14th, and the balance of the envelopes was postmarked November 15th.

"In view of these facts, is it your opinion that this office should collect a 20% penalty on the Beer Tax which should have been paid by November 15th, but which did not reach this office by November 15th, but at the same time, was postmarked November 15th?

"We are holding these checks until we receive an opinion, and your earliest possible attention will be most gratefully appreciated."

I am also in receipt of your letter of November 20, 1947, inquiring as to "whether or not it is the duty of the Commissioner of Licenses to collect the penalty" under consideration.

Act No. 415, Local Acts 1947 (Ms.), approved September 25, 1947, which levies the tax under consideration, provides in part as follows:

"Section Three: * * * * * (d) The license herein fixed and prescribed in such section (a) of this section shall and must be paid by each person against whom the same is levied, or who is liable or subject to such license under the provisions hereof, on or before the 15th day of each calendar month, at the time of filing the statement required by sub-section (c) of this section, which license shall be based on the sale, distribution, delivery, storage and taking out of storage, of malt or brewed beverages, during the calendar month next preceding; and any person failing, refusing, or omitting to pay such license within the time herein prescribed shall be guilty of a misdemeanor, and each day such default continues shall constitute a separate offense, and in addition to the other penalties herein provided for, there shall be addd to such license tax a penalty of twenty percentum of the amount thereof for such delinquency, said penalty to be paid to the License Inspector, and by him paid into the treasury of the county for use as hereinafter set out." (Emphasis supplied.)

In answer to your first inquiry, your attention is called to the case of *McDowell v. Henry*, 238 Ala. 663, 193 So. 108, in which it was held that payment for a license mailed to the license commissioner on October 31, but not received by the commissioner until November 1, was delinquent within a statute imposing a penalty for delinquent payment of license taxes, and that the penalty must be collected. See also *State, on Behalf of Henry v. State, ex rel Hotel Tutwiler Operating Company*, 230 Ala. 657, 162 So. 365.

In view of the holding of the above cases, it is my opinion that your first inquiry must be answered in the affirmative.

Under the provisions of Section 10 of Act No. 415, *supra*, the tax must be paid to the License Commissioner. However, it is expressly provided in Section 3(d) of the Act that the penalty under consideration "be paid to the License Inspector, and by him paid into the treasury of the county for use as hereinafter set out." Section 11 of the Act imposes upon the License Inspector the duty to enforce the provisions of the Act.

Answering your second inquiry, it is my opinion that since under the provisions of Section 3(d), *supra*, the penalty must be paid to the License Inspector, and under the provisions of Section 11, *supra*, it is

the duty of the License Inspector to enforce the provisions of the Act, the duty to collect the penalty is imposed upon the License Inspector rather than the Commissioner of Licenses.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

January 13, 1948.

Hon. J. A. Logue,
Judge of Probate,
Houston County,
Dothan, Alabama.

Elections, Compensation of Election Officials.

Election Officials in counties where voting machines are used in whole or in part are entitled to \$5.00 per day compensation for such service.

Opinion by Assistant Attorney General Culverhouse.

Dear Sir:

Your request for an official opinion bearing date of October 13, 1947, is as follows:

"Please refer to Title 17, Section 198, as amended of the 1940 Code and to Act #240 of the 1945 Acts at page 359 and to a recent Act of the Legislature #127 of the Acts of 1947 and advise me as follows:

"The 1945 Act provided for per diem pay in election officials of \$5.00 in counties using voting machines in whole or in part. This county uses voting machines as well as paper ballot boxes and have been since the passage of this Act paying all the officials both for the voting machines and the paper ballot boxes and the absentee box the per diem provided of \$5.00.

"The 1947 Act #127 seeks to amend the Code Section first above mentioned.

"Please advise me if the last Act mentioned increases by \$3.00 per day the pay of election officials heretofore provided in counties using voting machines this Act #240 of the 1945 Acts; or if said 1945 Act stands alone and whether the last Act 1947, #127 only amends the original Code Section 198 of Title 17, in other words are election officials of Houston County, which use voting machines in part, to be paid \$5.00 per day or \$8.00 per day?"

It is my opinion that the election officials of Houston County, which use voting machines in part, are entitled to compensation of \$5.00 per day.

This compensation is provided for by Act No. 240, General Acts 1945, page 359, approved July 7, 1945, as construed with Act No. 311, General Acts 1943, page 299, approved June 28, 1943. Act No. 240 is found in Title 17, Section 103(1), Code of Alabama 1940, which reads as follows:

"§ 103 (1). Compensation of election officials.—In all counties and municipalities of this state in which elections are conducted in whole or in part by voting machines, all election officials shall be entitled to three dollars which shall be in addition to the compensation now provided by law for election officials. When the election is a municipal election, said compensation shall be paid out of the general fund of the municipality, and in all other elections, it shall be paid out of the county treasury, on proper proof of the service rendered." (Emphasis added)

This Act is interpreted as providing compensation for such election officials in the amount of \$3.00 per day in addition to the compensation provided for other election officials at the time the act was approved. Act No. 311, General Acts 1943, page 299, approved June 28, 1943, provided for the compensation to be paid election officials at the time Act No. 240 was approved. Act No. 311 is to be found in Title 17, Section 198, Code of Alabama 1940, and such code provision reads as follows:

"§ 198. Pay of election officers.—The returning officer, the inspectors and clerks, shall each be entitled to two dollars, and the returning officer, in addition, to five cents a mile in going to the court house and returning to the place of holding the election; the several claims to be paid out of the county treasury, on proper proof of the service rendered, to be preferred claims, payable from the money in the treasury not specially otherwise appropriated. * * * * (with certain other exceptions not pertinent to the present instance)"

Construing the above two acts together, we conclude that \$5.00 per day is the correct amount of compensation for such election officers of Houston County in which elections are conducted in part by voting machines.

With respect to the effect of Act No. 127, General Acts 1947 (Ms.), approved July 17, 1947, upon the compensation of election officials of Houston County, I am of the opinion that such act does not increase their compensation. This act merely amends Title 17, Section 198, Code of Alabama 1940, in that it increases the compensation of election officials. However, such increase does not affect the compensation of election officials in those counties in which voting machines are used in whole or in part as the compensation for such election officials is provided for by Title 17, Section 103 (1). It is to be noted that Section 103 (1) provided only for an additional amount of \$3.00 to the compensation then

provided for other election officials and did not provide for an additional amount of \$3.00 to such other compensation as now or hereinafter provided for other election officials.

It is, therefore, my conclusion that the wording of Act No. 240, General Acts 1945, page 359, approved July 7, 1945, found in Title 17, Section 103 (1), Code of Alabama 1940, prevents any increase in such compensation above that as provided for when the act was then approved. Thus, Act No. 127, General Acts 1947 (Ms.), approved July 17, 1947, does not increase the compensation of election officials of Houston County.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

January 14, 1948.

Hon. J. D. Mitchell, Director,
Department of Public Safety,
P. O. Box 1511,
Montgomery 2, Alabama.

Fine and Forfeiture Fund—Highway Patrol Fund—Department of Corrections and Institutions—Counties—Convicts—Fines and Forfeitures.

1. Fines collected for violation of the offenses of driving while intoxicated or "no driver's license," when the arrest is made by Highway Patrol officers, must be paid into the Highway Patrol Fund. Title 36, Section 2, Code of Alabama 1940. Title 36, Section 53, Code of Alabama 1940. Act No. 341, General Acts 1943, page 322, approved July 1, 1943.

2. Fines collected for the offense of "switching tag" should be paid into the fine and forfeiture fund of the county. Title 51, Section 706, Code of Alabama 1940, as amended by Act No. 361, General Acts 1945, page 578, approved July 6, 1945. Title 15, Section 392, Code of Alabama 1940.

3. A convict serving in the State penitentiary may pay full fine, and said fine should be distributed by the Department of Corrections and Institutions to the funds to which the fine would have been payable had it been paid at the time of conviction.

4. The following opinions are overruled, modified, or affirmed: Biennial Report of Attorney General, 1918-20, page 391; Biennial Report of Attorney General, 1920-22, page 320; Biennial Report of Attorney General, 1926-28, page 217; Quarterly Report of Attorney General, Vol. 3, page 188; Biennial Report of Attorney General, 1928-30, page 537; Quarterly Report of Attorney General, Vol. 17, page 175.

Opinion by Assistant Attorney General Sykes.

Dear Sir:

Your request for an official opinion bearing date of September 8, 1947, is as follows:

"On August 13, 1947 one Sam Mackey alias Willie Whetstone, Route #3, Box 114, Montgomery, Alabama, was arrested by Officers Phillips and Owen of the Highway Patrol on charges of 'Switching Tag' and 'No Driver's License.' On the same day Mackey was taken before Mrs. Lois P. Holliday, Justice of the Peace, Montgomery, Alabama, and fined one hundred dollars (\$100) or thirty (30) days at hard labor on the charge of 'Switching Tag' and ten dollars (\$10) or ten days at hard labor on the charge of 'No Driver's License.'

"Subject Mackey on August 20, 1947 was released from Prison #4 on the payment of the total amount of one hundred ten dollars (\$110) (fines in both cases). This money was paid to the Department of Corrections and Institutions at Montgomery, Alabama. Said Department forwarded same to the Fine and Forfeiture fund of Montgomery County.

"Please render an opinion as to whether or not the Department of Public Safety is entitled to receive the fines in these and like cases, including Driving While Intoxicated cases, when the arrests are made by Highway Patrol Officers."

It is my opinion that the Department of Corrections and Institutions was correct in forwarding part of the fine referred to in your inquiry (that part of the fine for "switching tag") to the Fine and Forfeiture Fund of Montgomery County, but that said Department of Corrections and Institutions was in error for forwarding that part of the fine which had been assessed for the offense of either driving while intoxicated or "no driver's license." The amount of the latter fine should have been paid into the Highway Patrol Fund.

Two of the offenses referred to in your inquiry are: (1) Driving while intoxicated, an offense defined by Title 36, Section 2, Code of Alabama 1940, and (2) "no driver's license." Act No. 341, General Acts 1943, page 322, approved July 1, 1943. It is to be noted that this statute, Title 36, Section 2, Code of Alabama 1940, appears in Chapter 1, Title 36, Code of Alabama 1940, and it expressly provides that all fees collected for the violation of this section shall be paid into the Highway Patrol Fund. See also Title 36, Section 53, Code of Alabama 1940. Act No. 341, supra, also provides that fines assessed for "no driver's license" shall be paid into the Highway Patrol Fund.

It is also well to note that under the facts stated in your request the arrest was made by Highway Patrol officers, and, therefore, Act No. 298, General Acts 1945, Page 494, approved July 9, 1945, has no operation in the instant case. Plainly, then, under the express provisions of

Act No. 341, supra, and Title 36, Sections 2 and 53, Code of Alabama 1940, the fine assessed against the defendant for driving while intoxicated or "no driver's license," had it been paid at the time of the judgment, should have been forwarded to the State Treasury to the credit of the Highway Patrol Fund.

The other offense for which fine was assessed was apparently a violation of Title 51, Section 706, Code of Alabama 1940, as amended by Act No. 361, General Acts of 1945, page 578, approved July 6, 1945. I find no specific disposition for a fine assessed for the violation of subsection (b) of Act No. 361, supra. Therefore, it is my conclusion that such fine, had it been paid at the time of conviction, should have been paid into the fine and forfeiture fund of the county. Title 15, Section 392, Code of Alabama 1940. Therefore, had the fines been paid at the time defendant was convicted, the fine for driving while intoxicated and for "no driver's license" should have been paid into the Highway Patrol Fund, while the fine for "switching tag" should have been paid into the fine and forfeiture of the county.

However, fines were not paid at the time defendant was convicted, and it appears that the defendant started serving his sentence in Prison No. 4, which is known to be a State prison under the jurisdiction of the Department of Corrections and Institutions. The question is, therefore, when the fine is paid later, that is, after he defendant has begun serving his term in the State prison, how should such fine be distributed?

It is my opinion that when a defendant is convicted and has been sentenced to hard labor for nonpayment of fine and is serving a sentence of hard labor in lieu of paying the fine, the Department of Corrections and Institutions may accept full payment of the fine and release the prisoner. You are further advised that the amount of the fine should be transferred to the fund to which it would have been payable had said fine been paid at the time defendant was convicted. This means that under the facts stated in your inquiry, when the Department of Corrections and Institutions accepted the full fine, the amount assessed for "switching tag" should be sent to the Fine and Forfeiture Fund of Montgomery County, and the amount assessed for driving while intoxicated or for "no driver's license" should be sent to the Highway Patrol Fund.

Since the opinions of the Attorney General on the question of whether or not convicts should be released from prison upon payment of the entire fine are in conflict, it is my judgment that this matter should be here discussed.

In an opinion under date of January 6, 1920, Biennial Report of Attorney General, 1918-20, page 391, it was decided that "upon the payment of the entire fine the convict is entitled to be released from the sentence therefor." This opinion held that the sentence to hard labor was only a practical alternative where the fine was not paid, and that the only purpose for the sentence was to enforce payment by compulsory methods; hence when the fine was paid the prisoner should be released. See Biennial Report of Attorney General, 1918-20, pages 391, 393.

On November 25, 1921, the above cited opinion was overruled. Biennial Report of Attorney General, 1920-22, page 320. Here it was held that after sentence was pronounced, sentencing the defendant to hard labor for nonpayment of the fine "and the time for making or continuing motions has elapsed," no agency of the State could discharge the prisoner except the Governor. Therefore, under the opinion rendered on November 25, 1921, the entire fine could not be paid while the prisoner was serving his term. The author of the opinion dated November 25, 1921, stated that he was "reluctantly forced" to the conclusion reached. He further stated that it would be more just to allow the fine to be paid, but the machinery was lacking whereby the defendant could be released upon payment. Biennial Report of Attorney General, 1920-22, page 320.

On July 12, 1927, the original opinion, allowing the defendant to pay his fine, was readopted. Biennial Report of Attorney General, 1926-28, page 217. The Attorney General in this opinion stated:

"It is my opinion that any other conclusion than the foregoing would be unfair and unjust, and would not be in keeping with the spirit of criminal procedure. To hold otherwise would impute to the Legislature of Alabama a desire to penalize pauperism. You are, therefore, advised that the said fine can be paid at any time after sentence."

On June 23, 1936, it was held by the Attorney General that not only could the prisoner pay his fine while he was serving a sentence of hard labor in lieu of paying a fine, but further that the Department of Corrections and Institutions was entitled to the amount of the fine. See Quarterly Report of Attorney General, Vol. 3, page 188; Biennial Report of Attorney General, 1928-30, page 537.

The conclusion of the last opinion was reaffirmed in November, 1939. Quarterly Report of Attorney General, Vol. 17, page 175.

Insofar as the opinions of this office hold that a defendant may pay his fine at any time after a sentence has been pronounced, sentencing him to hard labor for nonpayment of the fine, such opinions are affirmed. However, insofar as our opinions hold that the fine should be paid into the convict fund or the funds of the Department of Corrections and Institutions, such opinions are overruled. When the fine is paid it should be remitted to the fine and forfeiture fund of the county, or to such other fund that is expressly designated by law. Title 15, Section 392, Code of Alabama 1940, provides:

"§ 392. Fines to go to county, and judgment accordingly.—All fines and forfeitures shall be paid in money, and shall go to the county in which the indictment was found, or the prosecution commenced, unless otherwise expressly provided; and judgment therefor must be entered in favor of the state, for the use of the particular county."

See *Ryan v. Collins*, 196 Ala. 478, 71 So. 690.

If the fine were paid at the time judgment is pronounced, it would, of course, go into the fine and forfeiture fund of the county. Title 15, Section 392, Code of Alabama 1940. However, if the fine is not paid and the defendant is sentenced under the provisions of Title 15, Section 341, Code of Alabama 1940, he is transferred to the penitentiary under the provisions of Title 45, Sections 96 and 97, Code of Alabama 1940.

There is no authority of law for the Department of Corrections and Institutions to retain the fine paid into the convict fund. The fine which would have been paid into the fine and forfeiture fund of the county, and the fine which would have been paid into the Highway Patrol Fund, had the defendant paid the same promptly, cannot by implication be transferred into the State Convict Fund without statutory authority. It has been held that the fine may be paid after sentence is pronounced, because any other rule would be unfair and unjust. I think further that for the Department of Corrections and Institutions to retain a fine which was formerly due the county, or the Highway Patrol Fund, and which the statute requires to be paid to the county, or the Highway Patrol Fund, is likewise unfair and unjust.

You are, therefore, advised that the fines referred to in your inquiry should be distributed to the Highway Patrol Fund and to the fine and forfeiture fund of the county.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

January 14, 1948.

Hon. Travis Cosby,
Mayor,
City of Opp,
Opp, Alabama.

Municipal Recreation Boards—Right of County to contribute.

1. Covington County may contribute money from its general fund to the Opp Recreation Board.

Opinion by the Attorney General.

Dear Sir:

Your request for an official opinion, dated January 7, 1948, is as follows:

"The City of Opp, Alabama, has or will create a recreation board pursuant to the authority contained in Act No. 350, General Acts of Alabama, 1945. The City will designate for use as parks, playground, and recreation centers and facilities certain lands and property owned

by, leased by, or loaned to the city, and will also make an appropriation to the recreation board for support and maintenance of the board, a recreational program, and recreational lands, buildings, equipment and facilities.

"In view of the provisions of section 5 of the Act, supra, and particularly that provision which says, 'Any county or municipality may join with one or more counties or municipalities in acquiring property for recreational purposes and, through the recreational board, join similarly in the operating and maintaining of playgrounds, parks, and recreation centers and facilities,' may Covington county lawfully contribute from its general funds any sum of money to said municipal board so created by the City of Opp, Alabama, for the maintenance and operation of said recreation facilities, playgrounds, and parks lawfully under the operation and control of said municipal board?"

It is my opinion, in view of the provisions of the Act, with specific reference to the mandate that "This Act shall be construed liberally," that your question should be answered in the affirmative. The full text of the Act is as follows:

"Section 1. The governing body of any county or the governing body of any municipality with a population of not more than one hundred thousand (100,000), according to the most recent federal census, may by resolution or ordinance, duly recorded in its minutes, create a recreation board.

"Section 2. Each recreation board shall consist of five (5) members selected by the county or municipal governing body from residents of the county or municipality who have recognized interest in recreational activities. Members of the recreation board first shall be appointed as follows: One (1) for a term of one (1) year; one (1) for a term of two (2) years; one (1) for a term of three (3) years; one (1) for a term of four (4) years; and one (1) for a term of five (5) years. As the terms of members expire, their successors shall be selected for terms of five (5) years each. Vacancies in unexpired terms shall be filled in the same manner as original appointments are made. The board shall elect from its membership a chairman and secretary, and such other officers, as it deems necessary, to serve at its pleasure. The board shall adopt rules and regulations covering the procedures of the board and the use of lands, buildings, equipment, and other facilities under its jurisdiction. Members of the board shall serve without compensation.

"Section 3. The recreational board may employ a county or municipal director of recreation to be its executive officer. The director, with the approval of the board, shall employ such staff as may be necessary to effect the recreation program determined by the board. The salaries of the director and the staff shall be fixed by the board. The tenure of the director and the staff shall be at

the pleasure of the board. Traveling and other expenses of the director and the staff while in performance of their duties shall be provided for by the board.

"Section 4. The recreation board shall be responsible for the direction, supervision, and promotion of such recreation programs as will contribute to the general welfare of the residents of the county or municipality. The board shall have control over all lands, buildings, equipment, and other facilities assigned for recreational purposes to the board by the county or municipal governing body or purchased or leased by it from funds provided by the governing body. The board shall cooperate with other local agencies and state and federal agencies for the purpose of maintaining and improving recreational services and facilities for the county or municipality. The board shall have power to accept financial and other aid and grants from any public or private agency.

"Section 5. The governing body of a county or municipality may make appropriations from county or municipal general funds to the recreation board for the support and maintenance of the board, a recreational program, and recreational lands, buildings, equipment, and facilities. The governing body may designate for use as parks, playgrounds, and recreational centers and facilities any lands or buildings owned by, leased by, or loaned to the county or municipality. The governing body may improve and equip or appropriate funds to the board for improving and equipping the lands and buildings for recreational purposes. The governing body may acquire lands, buildings, and facilities for recreational purposes by means of purchase, lease, loan, gift, or condemnation procedure and shall have power to accept financial and other aid and grants for recreation purposes from any public or private agency. Any county or municipality may join with one or more counties or municipalities in acquiring property for recreational purposes and through the recreation board, join similarly in the operating and maintaining of playgrounds, parks, and recreation centers and facilities. Any county or municipality may cooperate with another county or municipality by establishment and maintenance of a joint recreation board.

"Section 6. This act shall be construed liberally. If any section or part is declared invalid in its general or specific application, such declaration shall not affect the validity of other sections, parts, or applications.

"Section 7. All laws and parts of laws in conflict with this act are hereby repealed."

All municipalities in the State of Alabama, are authorized under the broad provisions of the general laws to engage in the operation of parks, playgrounds and recreational facilities and to acquire, purchase or lease land for such purposes. This authority is given to the municipal governing body, which may act without the aid of any board of committee, not connected officially with the municipality.

The legislature has deemed it proper and wise to authorize disassociation of such powers and authority in the matter of playgrounds, parks and other recreational facilities from the governing body itself and to authorize the creation of a board with full power and authority, as set forth in Act No. 350, supra, to operate and maintain such parks, playgrounds and recreational centers and facilities and to have full power and control over the lands and buildings designated therefor.

No doubt the Legislature recognized the financial inability of many towns and cities under one hundred thousand (100,000) population in Alabama, to adequately finance the operations of such facilities, and for that reason provided a means by which the counties could join with the municipalities in providing recreational centers and the maintenance of parks for recreational purposes. The inhabitants of a municipality, of course, are a part of the general population of the county and their welfare and advancement, and the children also, are and should be of material concern to the governing body of the county. Likewise the morals and welfare of the children in the rural area should be of concern to the inhabitants of a municipality. This is manifest by the fact that in many municipalities the schools therein are made available to the rural children, who come in by buses and who are trained in mental development and citizenship in the municipal schools.

Therefore, in consideration of these known facts, the Legislature in my judgment, by the adoption of Act No. 350, supra, authorized the county governing body to donate funds to the recreational board created by a municipality.

This statement is further supported by the fact that the legislature provided, as above stated, that the Act should be liberally construed. This liberality of construction was intended, no doubt, to help the municipalities provide recreational facilities. The text of the Act itself points strongly to such conclusion. It provides that any county may join with a municipality in acquiring property for recreational purposes and, through the recreation board, similarly in the operating and maintaining of playgrounds, parks and recreation centers and facilities, also it provides that they may operate a joint board. Further, it provides that the governing body may improve and equip or appropriate funds to the board for improving and equipping the lands and buildings for recreational purposes. Nowhere does the Act provide that the donation by the respective governing bodies must be confined to the board which it creates, but on the other hand, the Act in my judgment specifically authorizes cross donations or joint or separate operations.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

January 14, 1948.

Honorable Thomas W. Jones,
Judge of Probate,
Madison County,
Huntsville, Alabama.

Marriages—Health and Health Department—Marriage Certificates.

1. The effective date of Act No. 101, General Acts 1947 (Ms.), approved July 11, 1947, is January 2, 1948.

2. Act No. 101, supra, requiring physical examination of both parties before marriage license issues applies only to those licenses issued on or after January 2, 1948.

3. Persons obtaining marriage licenses before January 2, 1948, may comply with law before amendment, although marriage is performed on or after January 2, 1948.

Opinion by Assistant Attorney General Sykes.

Dear Sir:

Your request for an official opinion, bearing date of December 22, 1947, is as follows:

"A person obtained marriage license today for marriage planned January 3, 1948. The new marriage law has this provision 'No minister or other person authorized to perform marriage ceremonies in Alabama shall perform such ceremony unless the certificate form of each contracting party is attached to the marriage license.'

"There will be numerous cases of this kind between now and January 1st particularly during the last few days of the month.

"It is assumed that the above provision regarding the performance of marriage ceremonies is intended to apply to license issued on and after January 2, 1948. The provisions of this new marriage law will not be known to a considerable number of people affected by it.

"At your earliest convenience, please advise me."

In my judgment, that part of Act No. 101, General Acts 1947 (Ms.), approved July 11, 1947, and amending Sections 95, 96, and 278 of Title 22, Code of Alabama 1940, providing that, "No minister or other person authorized to perform marriage ceremonies in Alabama shall perform such ceremony unless the certificate form of each contracting party is attached to the marriage license, the same to remain attached thereto; . . ." is applicable only to those marriage licenses issued on and after January 2, 1948.

In substance, the new marriage law provides that both of the parties must now obtain a certificate stating that each is free from venereal disease. Such certificate must be presented to the probate judge before

a marriage license issues. Heretofore only the male was required to have such examination. Title 22, Section 95, Code of Alabama 1940.

Act No. 101, supra, provides in Section 5 thereof, "That this Act shall become effective on January 2, 1948." In my judgment, this means that all persons applying for a license and receiving a license on and after January 2, 1948, must comply with the provisions of Act No. 101, supra. However, those persons who have applied for and received licenses under the provisions of the law before the effective date (January 2, 1948) of Act No. 101, supra, and such licenses have been issued prior to January 2, 1948, may be married without reference to the provisions of Act No. 101, supra, above quoted.

Very truly yours,

A. A. CARMICHAEL,

Attorney General.

January 15, 1948.

Hon. John R. Coffman,
Ex-Officio Clerk & Register,
Limestone County Court,
Athens, Alabama.

Statutes—Limestone County—Inferior Courts.

1. Local act creating The Limestone County Court and providing for fines and forfeitures to be paid into the general fund instead of the fine and forfeiture fund modifies general act requiring certain fines and forfeitures to be paid into the fine and forfeiture fund. Act No. 199, Local Acts 1947 (Ms.), approved July 24, 1947. Title 36, Section 53, Code of Alabama 1940. Act No. 298, General Acts 1945, page 494, approved July 9, 1945.

2. Fines for convictions of highway violations in The Limestone County Court should be paid into the general fund of the county, when the arrest is made by the sheriff, his deputy, or a county or municipal officer.

3. When an arrest is made by highway patrol officer for a highway violation, the fines and forfeitures are paid into the Highway Patrol Fund.

4. Judge of inferior court taking affidavit and issuing warrant of arrest and having authority to collect same fees as the circuit court not entitled to fee for taking affidavit and issuing warrant of arrest.

5. Clerk of inferior court (The Limestone County Court) taking affidavit and issuing warrant of arrest entitled to same

fees as would be charged in circuit court, and the local act provides that clerk may retain said fees.

6. Judge of The Limestone County Court taking affidavit and issuing warrant of arrest in cases where justice of the peace would have final jurisdiction entitled to same fees as justice of the peace, and should be paid into the general fund of the county.

7. There is no authority under Act No. 199, supra, entitling clerk of The Limestone County Court to retain five per cent commission on moneys collected and remitted to State.

8. In criminal cases transferred from circuit court to The Limestone County Court under the provisions of Act No. 199, supra, the clerk of the county court should include in cost bill costs incurred in circuit court.

9. Civil cases transferred from circuit court to The Limestone County Court under provisions of Local Act No. 199, supra, may carry costs accrued in circuit court upon circuit court making order to that effect or on agreement of parties.

10. Trial tax should, in no circumstances, be taxed in The Limestone County Court.

11. In criminal cases wherein defendant is acquitted in The Limestone County Court, after said case is transferred from circuit court under Act No. 199, supra, officers of circuit cannot claim officers' fees from the fine and forfeiture fund of the county under Title 11, Section 83, Code of Alabama 1940, since the local act provides that in cases of acquittal there shall be no clerks' or sheriffs' fees.

Opinion by Assistant Attorney General Sykes.

Dear Sir:

Your request for an official opinion bearing date of November 18, 1947, is as follows:

"Please refer to Local Acts No. 199, approved July 24, 1947, and give your official ruling upon the following matters, to-wit:

"1. Paragraph (d) of Section 7 of said Act, provides: 'All fines and forfeitures, except those required by law to be paid or remitted to the State Treasurer, or other State officer or department, all Solicitor's fees and all Court Reporters' fees shall be deposited by the Clerk in the General Fund of the County. The Clerk shall retain his own fees and fees of the Sheriff and witnesses and shall pay them to the parties entitled thereto. All other items of costs

shall be deposited in the general fund of the County, unless otherwise provided by State law.'

"(a) Does this paragraph of Section 7 and Section 16 of said Act repeal Section 53(1), Title 36 of the 1940 Code, as last amended, in so far as Limestone County is concerned?

"(b) In the event a sworn complaint is made to the Judge of the County Court and he issues the warrant of arrest which is charged and collected from the Defendant, must the fees for receiving the complaint and issuing the writ of arrest be deposited in the General Fund of the County?

"(c) In the event that the sworn complaint is made to the Clerk of the Court and he issues the warrant of arrest which is charged and collected from the defendant, must the fees for receiving the complaint, and issuing the writ of arrest, be paid over to the Clerk of the Court, due to the fact that the County Clerk is on a fee basis?

"2. Is there any authority under Act No. 199, approved July 24, 1947, or under any other law, either Local or General, under which a 5% commission may be retained by the Clerk of the County Court for remitting funds due the State and County?

"3. In the event of a transfer of any cases, either from the Criminal, Civil and/or Equity divisions of the Circuit Court of Limestone County, Alabama to the Limestone County Court, as provided for under Section 13 of said Act, must all accrued costs in the cases so transferred likewise be certified or transferred to said County Court to be charged to the Defendants, and, if collected, such costs paid to the parties entitled thereto, including the State and County for Trial Tax?

"(a) In the event of a transfer of a misdemeanor case from the Criminal Division of the Circuit Court to the said Limestone County Court under the provisions of Section 13 of the Act, and the State fails to convict, may the accrued fees in the Circuit Court due to the Officers of the Court before the transfer, be collected from the Fine and Forfeiture Fund of the county under the provisions of Section 83, Title 11 of the 1940 Code, in the same manner and under the same conditions as such fees would have been collectible had the case not been transferred and the State failed to convict.

"Your prompt attention will be greatly appreciated."

Your questions will be answered in the order in which each appears in your inquiry.

Act No. 199, Local Acts 1947 (Ms.), approved July 24, 1947, creates and establishes "The Limestone County Court." Broadly speaking, this

court has the jurisdiction of the circuit court, county court, and justice of the peace court, except for felony cases. Section 2, Act No. 199, supra.

In answer to your question 1(a), you are advised that Sections 7 and 16 of Local Act No. 199, supra, do not repeal but modify Title 36, Section 53(1), Code of Alabama 1940. Title 36, Section 53(1), Code of Alabama 1940, referred to in your inquiry is Act No. 298, General Acts 1945, page 494, approved July 9, 1945. Act No. 298, supra, and Title 36, Section 53, Code of Alabama 1940, provide for the disposition of fines and forfeitures when a person is convicted of a highway violation. Title 36, Section 53, Code of Alabama 1940, provides that such fines and forfeitures shall be forwarded to the State Treasurer and paid into the Highway Patrol Fund. Act No. 298, supra, provides that if the arrest is made by a sheriff, his deputy, or a county or municipal officer, the fine should be paid into the fine and forfeiture fund of the county, provided the county has a fine and forfeiture fund, and if not, into the general fund of the county. Since your county has a fine and forfeiture fund, Act No. 298, supra, would require that when the arrest is made by a sheriff, his deputy, or a county or municipal officer, the fine or forfeiture should be paid into the fine and forfeiture fund of the county. However, Section 7(d) of Local Act No. 199, supra, provides as follows:

"(d) All fines and forfeitures, except those required by law to be paid or remitted to the State Treasurer, or other State officer or department, all solicitor's fees and all court reporter's fees shall be deposited by the clerk in the general fund of the county. The clerk shall retain his own fees and the fees of the sheriff and witnesses and shall pay them to the parties entitled thereto. All other items of costs shall be deposited in the general fund of the county, unless otherwise provided by state law."

In my judgment, when an arrest is made by a highway patrolman for a highway violation, the fine or forfeiture in such cases should be paid into the Highway Patrol Fund, as provided by Title 36, Section 53, Code of Alabama 1940.

It is further my opinion that when the arrest is not made by a highway patrolman and is made by the sheriff, his deputy, or a county or municipal officer, and the offense is a highway violation and the case is tried in The Limestone County Court, the fine or forfeiture should not be paid into the fine and forfeiture fund of the county as provided for in Act No. 298, supra, but should be paid into the general fund of the county as provided for in Local Act No. 199, supra.

In answer to your question 1(b), you are advised that when a complaint is sworn to before the judge of the county court and he issues a warrant of arrest under the provisions of Section 8 of Act No. 199, supra, the judge of the county court is entitled to the same fees as would be taxable in the circuit court. Section 7(a) of Act No. 199, supra. I find no authority of law for the circuit judge to claim a fee for receiving a complaint and issuing a warrant of arrest.

If the case is of the type in which a justice of the peace would have final jurisdiction, the judge of the county court would be entitled to the same fee that a justice of the peace would be entitled to for taking complaint and issuing a warrant of arrest. Section 7(a) of Act No. 199, supra. However, this item of cost should be paid into the general fund of the county. Section 7(d) of Act No. 199, supra.

In answer to your question 1 (c), you are advised that in the event the clerk of the county court receives a sworn complaint and issues a warrant of arrest and the defendant pays such fees, the clerk of the county court is not required to pay said fees into the general fund of the county, but retains his own fees. Section 7(d) of Act No. 199, supra.

In answer to your question 2, you are advised that there is no authority in Act No. 199, supra, nor do I find authority in any other local or general act under which the clerk of The Limestone County Court may retain a five per cent commission for remitting funds to the State and county. You probably have in mind Title 11, Section 22, Code of Alabama 1940, which provides that the clerk and the register of the several circuit courts shall receive five per cent on any sum collected for the State of Alabama as compensation for the collection and remittance of the same. Further, the local act also provides that "the usual fees and costs shall be taxed as in the circuit court, . . ." Section 7(a) of Act No. 199, supra.

It has been held, however, that only the circuit clerk is entitled to receive this five per cent commission. See Quarterly Report of Attorney General, Vol. 20, page 284. You are not, therefore, entitled to the five per cent commission.

In answer to your question 3, you are advised that when a criminal case is transferred from the Circuit Court of Limestone County to The Limestone County Court, under the provisions of Section 13 of Act No. 199, supra, it is provided that "such case shall proceed as though begun therein." Section 13(b) of Act No. 199, supra. To me, this phrase means that when a misdemeanor case is transferred to The Limestone County Court, under the provisions of Section 13(b) of Act No. 199, supra, it should be transferred with all the costs that had accrued in the circuit court. In my opinion, such items of cost in the circuit court in the misdemeanor case should be taxed in the bill of costs when the case is disposed of in The Limestone County Court, and be distributed to the parties entitled to such costs, under the provisions of Section 7(d), Act No. 199, supra, requiring the clerk to pay the fees "to the parties entitled thereto."

Since Section 7(a) of Act No. 199, supra, specifically requires that no trial tax shall be charged in any case, it is my opinion that this item of cost should not be charged in the bill of costs.

There is no provision of law in Act No. 199, supra, and especially in Section 13(c) thereof, requiring accrued costs in transferred civil

cases to be assessed after the case has been disposed of in The Limestone County Court. I suggest that such costs should be paid according to an order of the circuit court upon making the transfer, or by agreement of the parties under the provisions of Section 13(c) of Act No. 199, supra.

In answer to your question 3(a), you are advised that when a misdemeanor case is transferred from the criminal division of the circuit court to The Limestone County Court under Section 13 of Act No. 199, supra, and the State fails to convict, the fees of the officers of the court before the transfer could not, in my opinion, be collected from the fine and forfeiture fund of the county under the provisions of Title 11, Section 83, Code of Alabama 1940, for the reason that there has been no trial in the circuit court. See Title 11, Section 83(b), Code of Alabama 1940. Since such transferred cases "shall proceed as though begun therein" (Section 13(b), Act No. 199, supra), it is my judgment that the officers' costs in case the defendant is acquitted should be paid under the provisions of Section 7(f) of Act No. 199, supra. As provided therein, when the defendant is acquitted, there are no clerks' or sheriffs' fees.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

January 15, 1948.

Hon. Ward W. McFarland,
Director,
State Highway Department,
CAPITOL.

Highway Department—Counties—County Engineers—Salaries.
Where a county engineer is appointed pursuant to a local act and where his salary exceeds \$4,000 per annum, Highway Department is not authorized to participate in payment thereof. Title 12, Sections 67-72, Code of Alabama 1940.

Opinion by Assistant Attorney General Barton.

Dear Sir:

Your request for an official opinion dated December 29, 1947, is as follows:

"An opinion is requested on the interpretation of the authority of the State Highway Director under Title 12, Chapter 5 of the Alabama Code of 1940, to participate in the salary of the County Engineer.

"Specifically, the County of Montgomery pays their County Engineer a salary in excess of Four Thousand Dollars per annum. They have made formal request to the Highway Director to par-

ticipate in the payment of same. It is their contention that they are entitled to reimbursement up to 50% of the maximum set forth in the above referenced title and chapter.

"I will appreciate your letting me hear from you concerning the above at your earliest convenience."

The authority of the State Highway Department to participate in the payment of the county engineer's salary is found in Title 12, Section 70, Code of Alabama 1940, which gives to the State Highway Director discretionary authority to participate to the extent of "one-half of the salary of said county engineer per annum."

Section 67 of the same Title authorizes the appointment of a county engineer and stipulates that his salary shall not exceed four thousand dollars per annum. I am advised that the county engineer of Montgomery county receives an annual salary of \$6,600. This appointment was made and the salary was fixed, however, not under Chapter 5 of Title 12, but under Local Act No. 76, Local Acts 1939, page 39, approved March 1, 1939. Chapter 5 is the codification of Act No. 549, General Acts 1939, page 868, approved September 19, 1939, which did not become effective until October 1, 1939.

Therefore, in my judgment the authority for participation is restricted to those counties which have complied with the terms of Chapter 5. Since Montgomery County pays its county engineer in excess of the maximum fixed by Chapter 5, it is my opinion that you have no authority to participate to any extent in the payment of this county engineer's salary, payment of which is governed by the terms of Local Act No. 76, supra, pursuant to which he was appointed.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

January 16, 1948.

Hon. C. C. Horton, Director,
Department of Veterans' Affairs,
State of Alabama,
Montgomery 2, Alabama.

Taxation—Motor Vehicle License—Ad Valorem Taxes on
Motor Vehicles—Veterans—Exemptions.

Exemption of a disabled veteran under Act No. 19, approved June 19, 1947, General Acts Second Special Session 1947 of motor vehicle license and ad valorem tax is limited to an exemption upon the vehicle issued to the veteran by the Administrator of Veterans' Affairs, and is not applicable to any other vehicle owned by the veteran.

Opinion by Assistant Attorney General Goodwyn.

Dear Sir:

Your request for an official opinion bearing date of October 14, 1947, is as follows:

"We would appreciate an official opinion from you as to application of Act No. 19, Alabama Legislature, 1947. The subject of the Act is exemption from payment of motor vehicle license fees and ad valorem taxes of disabled World War II veterans who received motor vehicles under Public Law 663, 79th Congress.

"The case presented to this Department is that of a veteran of Jefferson County, Alabama, who received an automobile under Public Law 663, which automobile was later wrecked. The veteran received sufficient insurance on the wrecked automobile to purchase another automobile. Application for license and taxes exemption was made by the veteran on the vehicle subsequently purchased, and such application was denied by the license official in Jefferson County.

"Question: Is a World War II veteran who has been issued a motor vehicle under authority of Title I, Public Law 663, 79th Congress, entitled to exemption in Alabama of license fees and ad valorem taxes, under Act No. 19, Alabama Legislature, 1947, on any motor vehicle owned by the veteran and operated by him for private use, or is entitlement to such exemption limited only to the motor vehicle actually issued to him by the Administrator of Veterans' Affairs?

"As automobile license fees and taxes are currently due, we would appreciate this opinion as soon as convenient."

It is my opinion that the application for license and tax exemption made by the veteran for the vehicle subsequently purchased was properly denied by the license official of Jefferson County.

The exemption of disabled veterans from license fees and ad valorem taxes with respect to a motor vehicle issued to them under authority of Title I of Public Law 663, 79th Congress, is authorized by Act 19, approved June 19, 1947, General Acts Second Special Session 1947.

The pertinent provisions of such Act are as follows:

"Any disabled veteran of World War II to whom a motor vehicle has been issued or to whom a motor vehicle may be issued or to whom a motor vehicle may be issued in the future by the Administrator of Veterans' Affairs under authority of Title I of Public Law 663, 79th Congress, is exempt from all license fees and ad valorem taxes required by or prescribed in Article 8 of Chapter

20, Title 51 of the 1940 Code, provided the veteran keeps such motor vehicle only for private use."

The exemption is applicable only in the event that the vehicle has been issued to the disabled veteran by the Administrator of Veterans' Affairs and in the event that the veteran keeps such motor vehicle for private use only. This is an indication that the exemption is limited to the vehicle issued by the Administrator, and is not applicable to other vehicles that may be owned by the veteran.

Exemptions from taxation are construed strictly against the taxpayer claiming the exemption and in favor of the taxing authority.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

January 16, 1948.

Hon. J. A. Logue,
Judge of Probate,
Houston County,
Dothan, Alabama.

Counties—Courts of County Commissioners—Contracts.

Where a county contracted with the road inspector to furnish gas and oil for his car when performing his duties in reference to a road project, the county is without authority to pay such inspector an amount in excess of that fixed by the contract.

Opinion by Assistant Attorney General Arbuthnot.

Dear Sir:

Your request for an official opinion bearing date of September 12, 1947, is as follows:

"I would like to obtain an Attorney General's ruling on the following set of facts:

"In building highway project number S-84(1) between Columbia, Alabama, and Cedar Creek, Alabama, in March and April, 1947, under what is known and called the Federal Aid Secondary System, the State of Alabama required the services of an inspector which was furnished by Houston County, Alabama, and charged to said project, and paid out of the County gasoline fund for actual expenses of his automobile used on said job. The expense of building a highway under the system of Federal Aid Secondary is borne one-half by the Federal Government, and one-fourth each by the County of Houston and State of Alabama. The State of Alabama and Federal Government in refunding the County of Houston for the expense of inspector used on the above job for the use of his

automobile, paid to the County the sum of four cents per mile for the month of March, 1947, for the number of miles turned in by the inspector on said job which sum amounted to \$105.68; and for the month of April, 1947, the sum of five cents per mile for the use of his automobile by the inspector which amounted to \$120.35. The county only paid to the inspector on the job for the actual expenses of his automobile used in connection with said work the sum of \$48.93. Therefore, Houston County, Alabama, received \$177.10 from the State of Alabama and Federal Government more than it paid to the inspector on the job for the use of his automobile in connection with said work. This money is now on deposit in the gasoline fund for this County. The inspector employed on the job who used his personal automobile in connection with said work has filed a claim against this county for the sum of \$177.10.

"Please give me your legal opinion as to whether the Board of Revenue would be justified under the law of Alabama to pay out of the gasoline funds of this County the sum of \$177.10 to the inspector who used his car on the above job set out."

According to the letter written to you by the county engineer of Houston County under date of October 6, 1947 (which letter you sent to me), the inspector agreed to use his personal car in performing his duties in reference to the road project referred to in your inquiry, and the county agreed to furnish gas and oil for the car when it was used by the inspector in performing such duties. This agreement (contract) fixed the liability of the county for the use of the inspector's car in performing his duties on the project.

Constitution of Alabama 1901, Section 68, provides in part as follows:

"The legislature shall have no power to grant or to authorize or require any county or municipal authority to grant, nor shall any county or municipal authority have power to grant any extra compensation, fee, or allowance to any public officer, servant, or employee, agent or contractor, after service shall have been rendered or contract made, *****"

To pay the inspector for the use of his car an amount in excess of the amount payable under the contract between the inspector and the county would be in violation of Section 68, supra, in that it would be a grant to an employee of the county of an extra allowance after contract had been made, and also after services had been rendered. The fact that the county was paid for the use of the inspector's car on the project an amount in excess of that agreed upon between the county and the inspector would not entitle the inspector to such additional amount.

In view of the above conclusion, it is my opinion that your inquiry should be answered in the negative.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

January 16, 1948.

Honorable F. H. Norton,
Judge of Probate,
Cherokee County,
Centre, Alabama.

Constitutionality—Statutes—Cherokee County.

Act No. 159, H. 331, Local Acts 1947 (Ms.), approved July 22, 1947, which amended Act No. 250, Local Acts 1939, page 138, relating to the creation of a Board of Revenue in and for Cherokee County, is unconstitutional for failure to comply with the provisions of Constitution of Alabama 1901, Section 106, in its passage.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

Your request for an official opinion bearing date of January 13, 1948, is as follows:

"At the 1947 Session of the Legislature of Alabama, Act No. 159, H. 331, a local act for Cherokee County, was passed.

"It is my information that this act was advertised in exactly the same manner as was Act No. 160, H. 332, another local act for Cherokee County which was passed at the 1947 Session of the Legislature, and which was recently declared unconstitutional, because of a defect in the advertisement, by the Supreme Court of Alabama in the case of Cherokee County v. F. M. Savage, Judge, Cherokee Law and Equity Court, 7 Div. 930, decided December 11, 1947.

"I do not have a copy of the advertisement of Act No. 159, *supra*, before me, but I request that you check the same in the records of the legislature and render me an official opinion as to whether or not it is unconstitutional for the same reason that Act No. 160, *supra*, was held unconstitutional by the Supreme Court.

"Inasmuch as this act has to do with the method of election of the members of the County Governing Body of Cherokee County and members of this body must be nominated and elected this year, time is of the essence, and I would appreciate an answer to this request at the earliest possible date."

I have examined the journals of the legislature and find that the proof of publication in regard to Act No. 159, H. 331, Local Acts 1947 (Ms.), approved July 22, 1947, which amended Act No. 250, Local Acts 1939, page 138, relating to the creation of a Board of Revenue in and for Cherokee County, is identical with the proof of publication in regard to Act No. 160, H. 332, Local Acts 1947 (Ms.), approved July 22, 1947, which abolished the Law and Equity Court of Cherokee County, except that

the respective bills are set out in the proof of publication pertaining thereto.

In the recent case of *Cherokee County v. F. M. Savage*, Judge, *Cherokee Law and Equity Court*, 7 Div. 930, decided December 11, 1947, the Supreme Court of Alabama held Act No. 160, *supra*, to be violative of Constitution of Alabama 1901, Section 106. I quote, as pertinent, from the majority opinion in that case:

"But we are compelled to hold that the act of July 22, 1947 is violative of section 106 of the Constitution of 1901.

"In order to meet the requirements of section 106, the proof as to publication must be spread upon the journal of each house. Such is the plain language of the Constitution.—*Sellers v. State*, 162 Ala. 35, 50 So. 340; *Tucker v. State*, 231 Ala. 350, 165 So. 249.

"The fatal defect is, as shown by the journals, the omission from the publication of notice of an intention to apply to the legislature for passage of the act. As we view it, no notice of such intention ever appeared in any publication. The publication relied on to give such notice was simply a publication, for the required time, of the bill in its entirety. No indication whatever, other than the bill itself, was given of an intention to apply to the legislature for the passage of such a bill. The publication did not even carry the word 'notice' as was done in the case of *Tucker v. State*, *supra*. The Court, upon rehearing, in the *Tucker case* said:

"The substance of our holding in the foregoing opinion is that notice of an intention to apply to the legislature for the passage of an act, published in full in the newspaper, does affirmatively appear, if necessarily inferred, viewed from any reasonable standpoint, though in such notice not stated in so many words; that section 106 of the Constitution does not require such notice to so directly state and, therefore, there appears no violation of its letter; and that the act thus published in full under the heading "Notice," viewed from the standpoint of common sense and sound reasoning, forestalls any deception of those interested and immediately affected thereby, thus giving full effect to the purpose of the framers of the Constitution, and meeting the substantial requirements of this constitutional provision.'

"To extend the doctrine announced in the *Tucker case*, *supra*, to the point of holding that the mere publication of a bill in its entirety, without more, is sufficient 'notice' of an intention to apply to the legislature for its passage, would completely nullify that part of section 106, *supra*, requiring such notice. There are too many other reasonable interpretations to be ascribed to such a publication. Our rules of liberal construction do not justify such a holding. The abolishing act of July 22, 1947, is therefore unconstitutional and void."

On the authority of this recent decision of the Supreme Court, I must hold Act 159, supra, to be unconstitutional for failure to comply with the provisions of Section 106, supra, in its passage, for the same reasons that the Supreme Court held Act No. 160, supra, to be unconstitutional for failure to comply with the provisions of said section of the Constitution in its passage.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

January 21, 1948.

Mrs. Thalia F. Pratt,
Member, Board of Registrars,
Pickens County,
Carrollton, Alabama.

Board of Registrars—Meetings. Act No. 262, General Acts 1943, page 233; Act No. 346, General Acts 1945, page 563.

Board of Registrars of Pickens County is authorized to hold sessions for the registration of voters for thirty working days between the dates of October 1, 1947 and December 31, 1947, and in addition thereto to hold sessions for the registration of voters upon the first and third Mondays of each of such month in conformity with, and for the purposes stated in, Act No. 346, General Acts 1945, page 563.

Opinion by Assistant Attorney General Hardin.

Dear Madam:

Your request for an official opinion, bearing date of November 17, 1947, is as follows:

"Please furnish the Board of Registration with the following information:

"Will the first Monday and the third Monday in December on which the Board sits be counted as a part of the thirty day period to be used for registering voters over the county, or will there be thirty days in addition to this time?

"The thirty day period begins tomorrow, November 18, and this information has been requested by the chairman of the board, J. D. Doughty.

"No special instructions have been issued to the board about this matter, and we believe the two days we are supposed to sit will be included as a part of this thirty day period, but we would appreciate this information."

In giving answer to your inquiry, consideration must be given to two acts of the Legislature, the first being Act No. 262, General Acts 1943, page 233, which act amends Title 17, Section 26, Code of Alabama 1940, the statutory law of the State governing the holdings of regular meetings by the county boards of registrars for the registration of voters. This act provides, in pertinent part, as follows:

"Section 1. That Section 26, Title 17, Code of Alabama of 1940, be and the same is hereby amended so as to read as follows: The board of registrars in each county shall visit each precinct at least once and oftener if necessary between October first and December thirty-first, 1939, and each two years thereafter, to make a complete registration of all persons entitled to register, and shall remain there at least one half a day. They shall give at least twenty days' notice of the time when, and the place in the precinct where they will attend to register applicants for registration, by bills posted at three or more public places in each election precinct, and by advertisement once a week for three successive weeks in a newspaper, if there be one published in the county. Upon failure to give such notice or to attend any appointment made by them in any precinct, they shall, after like notice, fill new appointments therein. The time consumed by the board in completing such registration shall not exceed thirty working days in any county, except that in counties having more than three hundred thousand population as shown by the last preceding census, the time shall not exceed seventy-five working days. The board of registrars in each county shall meet at the court house on the third Monday in January, 1940, and each two years thereafter and shall remain in session ten working days for the registration of voters."

The County of Pickens, by virtue of its population classification, falls within the purview of the general provisions of the above act and is subject to none of the exceptions thereto. It is, therefore, my opinion that the Board of Registrars of Pickens County is authorized to meet for a total of thirty working days between the dates of October 1 and December 31, 1947, it being further required that during such period the Board visit each precinct of the county at least once, and oftener if necessary, remaining in each precinct for at least one half day.

The second act to be considered is Act No. 346, General Acts 1945, page 563. This act makes the following provisions relative to registration:

"Section 1. That all persons in the armed forces of the United States, the Merchant Marine, the Red Cross, and all other affiliated organizations, stationed or serving outside the county of their residence, and all other persons otherwise qualified under the laws of the State of Alabama to register, are authorized to register to vote at any session of the Board of Registrars of the county of their residence and in which they are otherwise qualified to vote.

"Section 2. That the Board of Registrars of every county of the State of Alabama shall be in session at the court house, or one of the court houses, of their county on the first and third Mondays in each month for the purpose of registering all persons in the armed forces of the United States, Merchant Marine, Red Cross, and other affiliated organizations, stationed or serving outside the county of their residence, and all other persons otherwise qualified under the laws of the State of Alabama to register.

"Section 3. This Act shall not modify, change, repeal, or affect any Act, local or special, providing continuous or monthly sessions of the Board of Registrars of any county of this State.

"Section 4. This Act shall become effective immediately upon its passage and approval by the Governor or its otherwise becoming a law.

"Approved July 9, 1945."

Considering Section 3 of the above act, it is my opinion that it was the expressed intention of the Legislature to effect no change in the provisions of Act No. 262, supra which provided for a thirty working day period between the inclusive dates set out, but that in addition thereto, the Legislature intended to provide the additional facilities for registration prescribed by Act No. 346, supra.

Lending further support to such conclusion is the verbiage of the Title of such act which reads as follows:

"To facilitate the registration to vote of persons in the armed forces of the United States and affiliated organizations and to facilitate the registration of all other persons who are eligible for registration by providing for meetings of the Board of Registrars in every county in this State on the first and third Mondays in each month."

It is, therefore, my opinion that the Board of Registrars of Pickens County is authorized to hold sessions for thirty working days between the dates of October 1, 1947 and December 21, 1947, and in addition thereto to meet upon the first and third Mondays of each of such month in accordance with, and for the purpose stated within the provisions of Act No. 346, supra, such latter meetings to constitute no part of the thirty working day period allowed by Act No. 262, supra.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

January 21, 1948.

Hon. Bankhead Bates,
Chief, Highway Patrol,
Department of Public Safety,
Montgomery, Alabama.

State Highway Patrol Retirement System—Public Safety Department.

1. The State contribution to the State Patrol Retirement Fund created under the provisions of Act No. 710, General Acts 1947 (Ms.), approved October 9, 1947, for the fiscal year 1947-1948, and each fiscal year thereafter, must be paid from the surplus in the general fund of the State and not from the surplus in any fund under the control and supervision of the State Highway Patrol.

2. The term "patrol employee of the State Highway Patrol" used in Act No. 710, *supra*, has reference only to those employees of the State Highway Patrol who are assigned to duty as patrolmen, and such term cannot be extended to include stenographers, mechanics, clerks, etc.

Opinion by Assistant Attorney General Arbuthnot.

Dear Sir:

Your request for an official opinion bearing date of December 10, 1947, is as follows:

"Certain questions have arisen concerning the interpretation or application of Act No. 710 passed by the recent session of the Legislature. I desire your official opinion on the following questions:

"1. In Section 2 of said Act, in subsection (b), the statement is made that the State shall contribute to the State Patrol Retirement Fund for the fiscal years 1947-48, and each fiscal year thereafter, the sum of \$16,000.00, derived from the surplus at the end of the fiscal year. Does the word 'surplus' mean from any surplus in any fund under the control and supervision of the Highway Patrol, or does it mean the surplus in the general fund of the State?

"2. Throughout this Act the phrase 'patrol employee' is used. Does this mean that only arresting officers of the Highway Patrol are eligible for membership in this retirement system or does it mean all employees of the Highway Patrol, including mechanics, stenographers, clerks, etc.?"

The retirement system for the patrol employees of the State Highway Patrol was established by Act No. 710, General Acts 1947 (Ms.), approved October 9, 1947. Section 2(b) of this Act is as follows:

"(b) The State shall also contribute to the State Patrol Retirement Fund for the fiscal year 1947-1948 and for each fiscal year hereafter, the sum of sixteen thousand dollars (\$16,000.00) derived from surplus at end of fiscal year, and such sum is hereby appropriated annually."

In the case of *Weaver v. Tidwell*, 228 Ala. 169, 153 So. 218, the Court held that "to be paid out of the county treasury" meant to be paid out of the general fund of the county. In Section 2(b), supra, the word "pay" might well have been used rather than the word "contribute." As Section 2(b) is silent as to the surplus of what fund the \$16,000.00 must be paid (contributed), and there being nothing in the Act to indicate to what fund the word "surplus" refers, it is my opinion that the word "surplus" in said section refers to the general fund of the State and not to a surplus in any fund under the control and supervision of the State Highway Patrol.

In answer to your second inquiry, your attention is called to the fact that the term "patrol employee of the State Highway Patrol" is used consistently throughout the Act.

The following definition of the word "patrol" is found in Webster's New International Dictionary, Second Edition:

"2. Any perambulation of a particular district, beat, etc., to guard, watch, or protect it; also, the man or men assigned to this duty; * * *"

It will be seen from the above definition that a patrol is a person or persons assigned to travel over a certain area to guard, watch, and protect it.

In this connection, attention is also called to Section 18 of Act No. 710, supra, which is in part as follows:

"Section 18. This Act shall not in any manner affect the insurance laws of the State. 'On and after the effective date of this Act, all patrol employees of the State Highway Patrol who are covered by the provisions of this Act shall cease to be members of the Employees' Retirement System created by Act No. 515, General Acts 1945, approved July 9, 1945, and no further contributions to the Employees' Retirement System created thereby shall be made by such employees.'"

The above section clearly indicates that there is a class of State Highway Patrol employees who are not covered by Act No. 710, but are covered by the Employees' Retirement System created by Act No. 515, General Acts 1945, page 734.

Answering your second inquiry, it is my opinion that the term "patrol employee of the State Highway Patrol" in Act No. 710 has ref-

erence only to those employees of the State Highway Patrol who are assigned to duty as patrolmen (arresting officers), and such term could not be extended to include mechanics, stenographers, clerks, etc.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

January 21, 1948.

Hon. W. H. Drinkard,
Director of Finance,
Department of Finance,
Montgomery 4, Alabama.

Colleges and Universities—Alabama College—Trust Funds—
Timber.

1. Growing trees are part of the realty and the sale thereof constitutes a sale of land or an interest or estate therein.

2. The sale of growing timber from lands held by the State of Alabama and Alabama College under Act of Congress, requiring proceeds from sale of land to be paid into trust fund, requires that proceeds from sale of growing timber be paid into trust fund.

3. The State of Alabama is required to pay six per cent interest on funds held in trust fund established by Title 52, Section 471, Code of Alabama 1940. Title 52, Section 473, Code of Alabama 1940.

Opinion by Assistant Attorney General Sykes.

Dear Sir:

Your request for an official opinion bearing date of December 15, 1947, is as follows:

"By Congressional Act, U. S. Senate Bill No. 2768 by John T. Morgan, approved February 18, 1899, the Federal Government granted to the State for the use of Alabama College 25,000 acres of land and provided that 'The proceeds of said lands when sold or leased shall forever remain a fund for the use of the Industrial School for Girls of Alabama, located at Montevallo, Alabama.'

"Prior to 1926 the State of Alabama has conveyed title to all of this 25,000 acres of land except approximately 1500 acres, title of which still remains in the State. The proceeds from the sale of the lands were deposited in the State Treasury as provided in the grant and in Section 471, Title 52, Code of Alabama 1940 and the

same provision of State law prevailed at that time. The last large sale of this property occurred in 1925 when 8,986 acres of land was sold to The Tennessee Land Company, Birmingham, Alabama. In the conveyance of this land to The Tennessee Land Company, the State reserved the rights to timber until 1950. During the fiscal year 1945-46 the Board of Trustees of Alabama College elected to dispose of the timber on this land and under direction of the Governor's Office the proceeds from the sales of timber was deposited in the State Treasury.

"On December 8, 1947 Alabama College held another sale of timber from the lands still in the name of the State for the benefit of the College. The proceeds from this timber sale has not yet been deposited in the State Treasury and I am not sure that such funds received should be deposited into the Land Grant Fund.

"In the light of the foregoing premises will you please give me your official opinion on the following questions:

"1. Should the proceeds from sale of timber which grows on lands granted for the use of Alabama College be deposited in the State Treasury?

"2. Can the State legally pay the six percent interest to Alabama College on funds arising from the sale of timber from lands granted to Alabama College?

"3. In the event your official opinion is that such funds should have been paid to Alabama College, may the State Comptroller correct the error in deposit by drawing warrant from the Trust Fund in favor of Alabama College?"

1. In my judgment, the consideration or proceeds received by the State of Alabama or Alabama College for the sale of timber should be paid into the State Treasury, under the provisions of Title 52, Section 471, Code of Alabama 1940. Such proceeds should be paid into the State Treasury whether the timber is sold from lands still held in the name of Alabama College or whether the timber is sold from lands that have been conveyed by the State of Alabama and Alabama College, such conveyance reserving timber rights.

2. You are further advised that after the proceeds are paid into the State Treasury, the State is authorized and required to pay six per cent per annum to the College.

3. In view of my answers to questions 1 and 2, an answer to your question 3 is unnecessary.

The Act of Congress referred to in your inquiry appears in 30 Statutes at Large, page 837. This Act, which was approved on February 18, 1899, provides in part as follows:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the governor of the State of Alabama be, and he is hereby, authorized to select, out of the unoccupied and uninhabited lands of the United States within the said State, twenty-five thousand acres of land, and shall certify the same to the Secretary of the Interior, who shall forthwith, upon receipt of said certificate, issue to the State of Alabama patents for said lands: **Provided**, That the proceeds of said lands when sold or leased shall forever remain a fund for the use of the Industrial School for Girls of Alabama, located at Montevallo, Alabama."

In order to carry out the proviso in the Act of Congress, *supra*, Title 52, Sections 471, 472, 473, Code of Alabama 1940, provides as follows:

"Sec. 471. Use of lands received by federal grant.—The lands now owned by Alabama College, granted by the congress of the United States to the State of Alabama for the use of this institution, shall only be leased or disposed of by the board of trustees, with the approval of the governor, provided, the board of trustees may delegate to an executive committee to be composed of three or more of its members, the right and power to lease or sell any of said lands, with the approval of the governor, and when any lease or sale shall have been made as herein provided, the governor, upon request of the board of trustees, or its executive committee, as the case may be, shall execute contracts of lease, or deeds of conveyance as may have been agreed on between the board or its executive committee, and the leasee or purchaser. All the proceeds arising from the sale of lands shall be paid into the treasury of the state to remain forever as a fund for the use of the college, and upon which there shall be paid to the college interest at the rate of six per cent per annum, it being the purpose and intent of the State of Alabama to execute in good faith the trust reposed in it by congress when granting the lands to the state for the benefit of the institution and to preserve the proceeds arising from the leases or sales of the lands of the institution so granted by congress as a fund forever and to pay the interest thereon for the support and maintenance of the institution.

"Sec. 472. Proceeds from lands; disposition of.—The proceeds of all lands sold or leased by Alabama college shall be paid into the treasury. The college, out of the money appropriated by the state legislature for its maintenance shall pay all the expenses of caring for, protecting, and selling the lands.

"Sec. 473. Interest paid college by state.—On the last day of every quarter the treasurer of the state shall pay to the treasurer of the Alabama college, upon the order of the president of the institution, interest at the rate of six per centum per annum, on the whole amount of the fund in the treasury at the close of every quarter, arising from the sale of lands, and upon every sum paid into the treasury before the current quarter upon which interest

has never been paid; it being the purpose and intent of the State of Alabama to execute in good faith the trust reposed in it by congress when granting the lands to the state for the benefit of the institution and to preserve the proceeds arising from the leases or sales of the lands of the institution so granted by congress as a fund forever and to pay the interest thereon for the support and maintenance of the institution."

Clearly, when the lands conveyed to the State of Alabama for the use of Alabama College are sold or leased, the proceeds should be paid into a trust fund described in Section 471, *supra*. The only question to be decided is whether or not the sale of timber is a sale of land within the meaning of Section 471, *supra*.

It has been held that growing trees are part of the realty or land. The right to enter upon land and cut trees thereon and remove the timber therefrom is a right that inheres in the land and constitutes an estate in the land itself. *Heflin v. Bingham*, 56 Ala. 556, 28 Am. St. Rep. 776; *Ray v. Hilman*, 229 Ala. 424, 157 So. 676.

It is my opinion, therefore, that when the State of Alabama or Alabama College conveys timber rights on land held under the Act of Congress, *supra*, and receives a consideration therefor, such transaction is a sale of land or a sale of interest in land within the meaning of Title 52, Section 471, Code of Alabama 1940, and that the proceeds should be paid into the trust fund and interest paid thereon by the state.

It is further my opinion that when the State of Alabama or Alabama College conveys land by deed and reserves timber rights on the land and later such timber rights are conveyed to another and a consideration is received therefor, such consideration constitutes proceeds from the sale of land or an interest or estate in the land; and further that such proceeds should be paid into the trust fund in the State Treasury and interest paid thereon by the State. Title 52, Sections 471, 473, Code of Alabama 1940.

Very truly yours,

A. A. CARMICHAEL,
Attorney General.

January 21, 1948.

Hon. S. Fleetwood Carnley, Director,
Department of Industrial Relations,
CAPITOL.

Statutes—Effective Date—Personnel Board—Constitution of
Alabama 1901, Section 21.

When the legislature, by act duly and legally passed, fixes
the effective date of a salary of a person in the employment

of the State as of August 16, 1947, the Personnel Board has no power or authority, by its action in fixing this salary, to provide that it shall become effective as of December 1, 1947.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

Your request for an official opinion bearing date of December 22, 1947, is as follows:

"Your advisory opinion is requested with respect to the interpretation of Act No. 364, House Bill 356, approved August 16, 1947, which among other things, amended Section 25 of Title 26, 1940 Code.

"The particular circumstances out of which this request arises are: Mr. C. F. Anderson is, and at all times since August 16, 1947, has been the director of Employment Service, an employee appointed under the provisions of the Merit System Law. Upon the passage of said amendatory Act, he inquired of Mr. Charles W. Terry, State Personnel Director, as to whether or not in Mr. Terry's opinion it was necessary for me to submit an immediate recommendation to the State Personnel Board as to what amount I considered to be an appropriate salary arrangement for the office of Director of the Employment Service in connection with the amended Section 25 of Title 26. Mr. Terry stated that in his opinion in view of the complexity of the information required by the amended section that any reasonable delay would be without prejudice to the prompt payment of the salary. Accordingly, for the November meeting of the Personnel Board, I submitted a recommendation based on information with respect to other states. The Board requested that additional information be furnished and, accordingly, it was not until December 1947, that the Governor approved the Board's action in setting this salary with a proviso inserted by the Board that the effective date should be from and after December 1, 1947.

"In view of the apparent conflict between the proviso and the third paragraph of your letter of December 10, 1947, to Mr. Terry, it is necessary that you furnish an opinion to settle the effective date of this finding of the Board so that I may be guided in preparing a supplemental pay roll covering the difference between the amount of money heretofore paid Mr. Anderson and the amount payable by operation of the new statute.

"Accordingly, your answer is requested to the following questions:

"(1) Does the Personnel Board under the terms of Act No. 364, approved August 16, 1947, have jurisdiction to set the date at which the salary based upon the new statutory standards shall commence?

"(2) If your answer to the foregoing question is in the negative, then does the paying of such salary from August 16, 1947,

solely from grants received from the Federal Government violate any constitutional statutory or common law inhibition against retro-active payments of salaries?"

My answer to your first inquiry is in the negative.

Act No. 364, H-356, General Acts 1947 (Ms.), removed the limitation heretofore placed on the salary of the director of employment service and provides that his salary shall be paid solely from federal funds and shall be comparable to salaries paid similar officers in comparable states.

Section 3 of said act provides that it shall become effective upon its passage and approval by the Governor. The Governor approved this act on August 16, 1947.

It is a well settled principle of law in this State that an act goes into effect upon its approval by the executive, unless otherwise provided. Alabama Digest, Key No. 255, and cases cited. Therefore, it is beyond question that Act No. 364, supra, became effective as of August 16, 1947.

You stated in your request that at the November meeting of the Personnel Board, you submitted information in regard to Mr. Anderson's salary, basing this information upon salaries paid to similar officials in comparable states. You further stated that, upon the submission of this information, additional information was requested by the Personnel Board, and that upon the presentation of this additional information, the Personnel Board fixed Mr. Anderson's salary at a certain figure with the proviso, however, that Mr. Anderson's salary would become effective as of December 1, 1947. It appears from your request that the Governor approved the Board's action in this regard.

Now we come to the question of the Board's authority to fix the effective date of Mr. Anderson's salary.

In this regard, your attention is called to Constitution of Alabama 1901, Section 21, which reads as follows:

"That no power of suspending laws shall be exercised except by the legislature."

It clearly appears from the above quotation of the Constitution that the legislature is the only body vested with the power to suspend laws, and I might add that the legislature could not have delegated this authority to the Personnel Board, for the Supreme Court of this State has held that this power is nondelegable, *Montgomery v. State*, 231 Ala. 1, 163 So. 365.

The Personnel Board, by its action, has sought to suspend the operation of Act No. 364, by providing that Mr. Anderson's salary should become effective on December 1, 1947, when the legislature itself has said that it should become effective on August 16, 1947. In other words, the

Personnel Board had no authority to say "when" Mr. Anderson's salary should be increased, but on the contrary, its only authority was to say "how much" it should be increased.

It is, therefore, my opinion that the Personnel Board exceeded its jurisdiction when it attempted to fix Mr. Anderson's salary as of December 1, 1947, rather than August 16, 1947, the effective date of the act.

Since, my opinion, Mr. Anderson's salary was fixed by the legislature at some figure as of August 16, 1947, the question of retroactive payment of salary cannot arise in this situation. The only question to be determined after the effective date of Act No. 364, supra (August 16, 1947), was how much salary should Mr. Anderson receive as of that date. When the Personnel Board finally arrived at a figure for his salary, it had the effect of fixing it as of August 16, 1947, not retroactive, but on a day certain fixed by the legislature.

You are, therefore, advised that, in my opinion, you may properly submit a supplemental payroll for Mr. Anderson's salary and the Personnel Board may honor this payroll without violating any statutory or constitutional provision of law.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

January 22, 1948.

Hon. G. H. Howard,
Judge of Probate,
Elmore County,
Wetumpka, Alabama.
Court Reporters—Counties.

The county governing body is authorized to purchase sound recording equipment for use of the court reporter. Title 13, Sections 262, 269, Code of Alabama 1940.

Opinion by Assistant Attorney General Sykes.

Dear Sir:

Your request for an official opinion bearing date of December 15, 1947, is as follows:

"Please advise us whether or not Elmore County can legally purchase Sound Recording Equipment for the Court Reporter. This equipment will be used for taking testimony in all courts requiring the services of the Court Reporter.

"Your usual prompt attention will be greatly appreciated."

In my opinion the county governing body is authorized to purchase sound recording equipment for the official use of the court reporter.

Title 13, Section 269, Code of Alabama 1940, provides as follows:

"§ 269. Stationery and supplies furnished by counties.—All stationery and supplies to be used by such official or special reporters in their capacity as such shall be furnished and paid for by the county or counties composing the respective circuits in the manner provided for the payment of the salaries of such official and special reporters on requisition signed and approved by the judge of the court."

It has been held that this Code section, authorizing the county to purchase supplies for the court reporter, includes authority to purchase supplies for the court reporter, includes authority to purchase a typewriter for the court reporter. Quaterly Report of Attorney General, Vol. 17, pages 307, 308.

It is my judgment that if the county governing body is of the opinion that sound recording equipment is reasonably necessary in order to enable the court reporter to perform his duties efficiently, the county governing body has the discretion to purchase such equipment under the provisions of Section 269, *supra*.

The county governing body, however, should consider, in exercising its discretion to purchase such equipment, the fact that the court reporter must be able to "correctly report in shorthand the proceedings in all trials. . ." The county governing body should also take into consideration the fact that the original stenographic notes of the court reporter in each case are required to be preserved by him and are part of the records of the court. Title 13, Section 262, Code of Alabama 1940. Therefore, when court proceedings are reported, such proceedings must be taken in shorthand and in writing by the court reporter, and such notes must be filed as part of the records in the case. The reasons pointed out are mentioned only to show that it may be unwise for the county to purchase such equipment. On the other hand, this has nothing to do with the county's authority to purchase such equipment under the provisions of Section 269, *supra*.

In my opinion, it would not be unreasonable for the county governing body to decide that even though court proceedings were taken by the official court reporter in stenographic form a recording machine would insure more accuracy when such notes are transcribed.

It is within the authority of the county governing body, therefore, to purchase or refuse to purchase sound equipment for the use of the court reporter.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

January 23, 1948.

Hon. Roy E. Blair,
Tax Assessor,
Madison County,
Huntsville, Alabama.

Taxation—Real Property—Assessment Thereof.

1. When a taxpayer owns real property as of October 1, 1947, and begins to construct a house on such property on October 8, 1947, such property, for the tax year 1948, should be assessed as unimproved property.

2. When a person has lumber located on an unimproved piece of property on the first day of October 1947, for the purpose of constructing a house, such construction to begin after October 1, 1947, such lumber should be assessed as personal property.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

Your request for an official opinion bearing date of December 20, 1948, is as follows:

"Please give me your opinion on the following question.

"X buys a lot on July 15, 1947, and begins construction of a house on October 8, 1947. He comes in to assess his 1948 taxes on December 15, 1947, and states his house is practically completed. I am assuming that on October 1st., he owned lumber, with which to construct the house, and that such lumber was bought in Huntsville, or Madison County. Should I assess the lumber he owned October 1st. as personal property, or should I assess the house per the value of December 15?

"Thanking you for an early ruling."

In answer to your request, you are advised that X's lot for the tax year 1948, should be assessed as unimproved property, and the lumber which he owned and had on the property as of October 1, 1947, with

which to begin construction of his house on October 8, 1947, should be assessed as personal property.

"The term 'real property' shall be held to mean and include not only land, city, town and village lots, but also all other things thereunto pertaining, and all structures, and all other things so annexed or attached thereto as to pass to a vendee by the conveyance of the land or lot." Title 51, Section 1(b), Code of Alabama 1940.

Personal property includes " * * * all things other than real property, so defined, * * * ." Title 51, Section 1(c), Code of Alabama 1940.

Applying these definitions and this test to the facts set out in your request, I am of the opinion that the lumber therein referred to, located on the taxpayer's land, should be assessed as personal property, for certain it is, had X conveyed this property as of October 1, 1947, the lumber would not have passed to the vendee under such conveyance. Therefore, since it is well settled in this State that the legal date for assessing taxes is October 1 of any given year, when X came in to assess his property on December 15, 1947, you should have assessed the lot as unimproved real property and the lumber on the lot as personalty.

My statement that you should assess this lumber as personal property is based on the correctness of your assumption that X owned lumber as of October 1, 1947.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

January 23, 1948.

Hon. J. T. Burch,
Tax Assessor, Morgan County,
Decatur, Alabama.

Taxation — Corporations — Tax Assessors — Title 51, Section 21 (m), 25 and 884, Code of Alabama 1940.

Shares of stock of a domestic corporation incorporated after October 1 are not subject to assessment to the holders thereof for the current tax year.

Opinion by Assistant Attorney General Arbuthnot.

Dear Sir:

Your request for an official opinion bearing date of March 21, 1947, is as follows:

"Several corporations were organized in Morgan County, Alabama in January, 1947.

"The question arises whether or not the shares of stock of these corporations are subject to ad valorem tax for the current year, under the provisions of Section 25 of Title 51 of the Code of Alabama of 1940, and I ask your official opinion with reference to that and whether or not it is my duty to require an assessment to be made.

"If you should answer that the shares of stock of such corporations are subject to assessment for ad valorem tax for the current year, please advise me just how the assessment should be made and, particularly, what balance sheet should be used or what information in lieu of a balance sheet should be used in making the assessment, it being true of course that no balance sheet exists showing the condition of the corporation at the close of its fiscal period next preceding October 1, 1946, there being no such fiscal period. Also advise me whether or not such return, if required, should show the tangible personal property and real property now owned by the corporations but which were of course assessed to the persons who owned the same on October 1, 1946."

The tax on corporate shares of stock is levied under the provisions of Title 51, Section 25, Code of Alabama 1940, which section is in part as follows:

"Sec. 25. Assessment and collection.—Every share of any domestic corporation (with exceptions not here pertinent), shall be assessed and the taxes thereon collected in the county wherein such corporation has its home or chief office in the state, and shall be assessed at sixty percent of its value to the person in whose name such shares stand on the books of the corporation and not to the corporation. * * *"

It will be seen from the above section that the tax is levied on the shareholder and not on the corporation.

Title 51, Section 884, Code of Alabama 1940, provides in part as follows:

"Sec. 884. Date of lien.—From and after the first day of October of each year, when property becomes assessable the state shall have a lien upon each and every piece or parcel of property owned by any taxpayer for the payment of all taxes which may be assessed against him and upon each piece and parcel of property real or personal assessed to owner unknown which lien shall continue until such taxes are paid, and the county shall have a like lien thereon for the payment of the taxes which may be assessed by it; * * *"

In considering Section 884, *supra*, the Supreme Court, in the case of *United States v. Alabama*, 313 U. S. 274, 85 L. Ed. 1327, said:

"October first is fixed as the tax day, and as of that day, owners are to make their returns, values are to be fixed and the taxes laid."

In the case of *Johnson, Tax Assessor v. State ex rel. City of Birmingham*, 245 Ala. 499, 17 So. 2d. 662, it was held:

"It is a well recognized rule in all procedures adopted for the annual assessment of property taxes, that there shall be one fixed date—a law day—with respect to which persons and subjects of taxation shall be determined and values fixed or assessed. *International Paper Co. v. Curry*, 243 Ala. 228, 9 So. 2d. 8, 12. In the last cited case the court said: 'Liability for franchise tax is as of a fixed date and there is no authority for the tax department to assess a tax based on liability other than of the law date of liability.'"

Title 51, Section 21 (m), Code of Alabama 1940, provides as follows:

"(m) All property brought into the state after the first day of October and before the assessor has completed his assessment, shall be subject to taxation the same as if it had been held or owned in the state on the first day of October."

In view of the above statutes and authorities, it is my opinion that, except as to property "brought into the state" after October 1 and before the tax assessor has completed his assessment, October 1 is the date fixed by statute for the owner of property in Alabama in assess the same for ad valorem taxes. Property not owned by a person or corporation on October 1 is not assessable to such person or corporation except as provided in Title 51, Section 21 (m), *supra*.

The above conclusion is in accord with a former opinion of this office (Biennial Report of Attorney General, 1922-24, p. 146), which is in part as follows:

"The Alabama City Bank received their charter and commenced business about the 20th of last October (1922). They also refused to make any assessment because they did not have anything in the State on October 1st. * * * *

"* * * under the facts stated, no ad valorem tax assessment should be made against the Bank until the tax assessment year beginning October 1st, 1923, unless said bank brought into this State taxable property from another State or county before the Tax Assessor completed his assessments as provided by subdivision (n) of Section 5 of the Revenue Act 1919, and then only as to such property. The real and personal property now owned by said bank, which was in the State on October 1st, 1922, should be assessed to the person or persons who owned it at that time. The shares of capital stock owned by the stockholder will not be taxable until October 1st, 1923."

It has been contended that "shares of stock that are issued upon the creation of the corporation between October first and the date of the completion of assessments by the assessor is 'property brought into the state after the first day of October and before the assessor has completed his assessments,'" and, therefore, subject to assessment for ad valorem

taxation. I do not agree with this contention. In my opinion Title 51, Section 21 (m), supra, only has application to property actually brought into the state from without the state after October 1 and before the assessor has completed his assessments.

In view of the above conclusion, it is my opinion that your first inquiry should be answered in the negative.

The answer to your first inquiry makes it unnecessary to consider your second and third inquiries.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

January 27, 1948.

Honorable O. H. McRight,
Administrator,
Alabama Alcoholic Beverage Control Board,
Montgomery 2, Alabama.

Alcoholic Beverage Control Board—Purchase of lands and construction of buildings—Title 29, Section 5, Code of Alabama 1940; Act No. 128 General Acts 1945, page 116.

1. Under the statutes creating and governing the operation of the Alcoholic Beverage Control Board, no authority is vested in such Board to purchase lands and to construct buildings.

Opinion by Assistant Attorney General Hardin.

Dear Sir:

Your request for an official opinion, dated November 12, 1947, is as follows:

“Section 5, Title 29, Code of Alabama 1940, reads in part as follows:

“‘To make provision for the maintenance of warehouses for alcoholic beverages and to control the delivery of alcoholic beverages to and from such warehouses and the keeping of the same therein.’

“Please advise us as soon as possible whether or not the Board under this provision would be authorized to purchase land and erect thereon a warehouse for the storage of alcoholic beverages.”

In my opinion, your inquiry must be answered in the negative.

The provisions of law setting forth the functions, duties and powers of the Alcoholic Beverage Control Board are found set out in Title 29,

Section 5, Code of Alabama 1940, and include, as set forth in your inquiry, a proviso to the effect that the Alcoholic Beverage Control Board shall have the power and authority

"* * * To make provision for the maintenance of warehouses for alcoholic beverages and to control the delivery of alcoholic beverages to and from such warehouses and the keeping of the same therein. * * *"

It is likewise provided within such statute that the Alcoholic Beverage Control Board shall have the power and authority

"* * * To lease and furnish and equip such buildings, rooms, and other accommodations as shall be required for the operation of this chapter subject to provisions of chapter 4 of title 55. * * *"

Nowhere within the statutes do I find any authority vested in the Board to purchase lands or construct buildings.

It is my opinion that the two provisions of Title 29, Section 5, supra, above quoted, must be construed together and so construing such provisions, it becomes my opinion that the Board is only empowered to exercise that authority granted it, that is, "to lease and furnish and equip such buildings, rooms, and other accommodations as shall be required for the operation of this chapter * * *." In my opinion, such does not include the power or authority to purchase lands and erect buildings thereon.

"* * * The word 'maintain' does not mean to provide or construct, but means to keep up, to keep from change, to preserve (Worcester Dict.); to hold or keep in any particular state or condition, to keep up (Webster Dict.) * * *." 26 Words and Phrases (Per. Ed.), Maintenance, 85.

It is, therefore, my opinion that there is no power or authority vested in the Alcoholic Beverage Control Board to purchase lands and erect thereon a warehouse for the storage of alcoholic beverages.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

January 27, 1948.

Hon. T. C. Almon,
Judge of Probate,
Morgan County,
Decatur, Alabama.

Counties—Holidays

A county's governing body may at its discretion declare offices in the county courthouse closed on the legal holidays enumerated in Title 39, Section 184, Code of Alabama 1940.

Opinion by Assistant Attorney General Barton.

Dear Sir:

Your request for an official opinion, dated January 17, 1948, is as follows:

"Will you please give me the benefit of your official opinion on the following question.

"The State Capitol observes holidays on the following days:

Sunday

January first, New Year's Day

January 19th, Robert E. Lee's birthday

February 22nd, Washington's birthday

Mardi Gras, Shrove Tuesday

April 13th, Thomas Jefferson's birthday

April 26th, Memorial Day

June 3rd, Jefferson Davis' birthday

July 4th, Independence Day

First Monday in September, Labor Day

October 12th, Columbus Day and Fraternal Day

November 11th, Armistice Day

Thanksgiving Day

December 25th, Christmas Day

"In your opinion, would the offices in the Courthouse of the respective counties be within their rights if they closed and took holidays on the above days which are recognized by the state?"

Title 39, Section 184, Code of Alabama 1940, provides in part:

"Sunday, Christmas day, New Year's day, Robert E. Lee's birthday, George Washington's birthday, Thomas Jefferson's birthday, Mardi Gras, Confederate Memorial Day, Jefferson Davis' birthday, the Fourth day of July, Labor Day, Columbus day and Fraternal day, Armistice day, and the day designated by the governor for public thanksgiving, shall each be deemed a holiday. If any holiday falls on Sunday, the Monday following is the holiday. . . ."

Title 13, Section 276, Code of Alabama 1940, as amended by Act No. 62, General Acts 1945, page 61, approved June 1, 1945, regulating the office hours of the Judge of Probate, provides:

"He must keep his office at the courthouse and open for transaction of business on every day, except Sundays and legal holidays, from nine in the morning until four in the afternoon; but in counties having a population of more than 300,000 inhabitants according to the last federal census or any subsequent one, he may close his office at 12 o'clock noon on Saturday."

Title 12, Section 4 (1) Cumulative Pocket Part, Code of Alabama 1940, allowing the closing of offices at noon one day each week, provides:

"All of the offices of the officials in the court houses of the several counties of the state of Alabama are hereby authorized and empowered to close at noon on one day in each calendar week during the year, such day to be determined by the court of county commissioners, board of revenue, or other governing bodies of the county by resolution spread upon its minutes."

It is optional with each individual as to whether or not he will observe legal holidays. If he does observe them by closing his office, shop, store or other place of business, he violates no law. If he does not, he violates no law. This is true of them all except Sunday. He must close on this day. Biennial Report of Attorney General 1934-36, page 99.

I find in our statutes no law, with respect to the days on which the offices in the county courthouse must be open for business, which supersedes Title 39, Section 184, supra. Therefore, in my judgment, the governing bodies of the respective counties can, at their discretion and by resolution spread upon their minutes, lawfully declare those offices closed on the legal holidays aforementioned.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

January 28, 1948.

Honorable J. D. Mitchell,
Department of Public Safety,
CAPITOL.

State Highway Patrol Retirement System—Public Safety Department.

Highway patrolmen who are assigned to the Drivers' License Division of the Department of Public Safety come within the meaning of the term "patrol employees of the State Highway Patrol" used in Act No. 710, General Acts 1947 (Ms.), approved October 9, 1947, and are, therefore, covered by the retirement system established by said Act.

Opinion by Assistant Attorney General Arbuthnot.

Dear Sir:

Your request for an official opinion, bearing date of January 23, 1948, is as follows:

"On January 21, 1948, you rendered an opinion to Hon. Bankhead Bates, Chief, Highway Patrol, Department of Public Safety, in which you held that the term 'patrol employees of the State Highway Patrol' used in Act No. 710, General Acts 1947 (Ms.), approved October 9, 1947, 'has reference only to those employees of the State Highway Patrol who are assigned to duty as patrolmen.'

"The question has arisen as to whether or not highway patrolmen, who are assigned to the Drivers License Division of the Department of Public Safety come within the meaning of the term 'patrol employees of the State Highway Patrol' used in Oct No. 710, supra.

"All highway patrolmen are given the regular merit system examination. They are then subjected to a rigid physical examination; are then sent through a training period of several weeks. At the end of which time they are given an examination on their schooling and if they successfully pass this they are then outfitted with a complete uniform, placed under a two thousand (\$2,000) bond, sworn in and then are commissioned highway patrolmen by the Director of Public Safety and Governor. This commission, as you know, gives them full authority as arresting officers in the State of Alabama. After this is all done they come to the Director for assignment as he sees fit. He may, at his discretion, according to vacancies that may exist, assign all of them to the Highway Patrol or all of them to the Drivers License Division or part of them to the Highway Patrol and part of them to the Drivers License Division. They are entirely flexible and may be shifted back and forth between the Drivers License Division and the Highway Patrol Division as the Director sees fit. They are all commissioned bonded arresting officers of the State Highway Patrol and are carried on our payroll as such. No distinction being made, whatever, between a patrolman who is assigned to the Drivers License Division and one who is assigned to highway duties.

"Please advise me whether or not highway Patrolmen who are assigned to the Drivers License Division of the Department of Public Safety come within the meaning of the term 'patrol employees of the State Highway Patrol' used in Act No. 710, supra, and are, therefore, covered by the retirement system established by said Act."

In answer to your inquiry, it is my conclusion that the term "patrol employees of the State Highway Patrol" used in Act No. 710, General Acts 1947 (Ms.), approved October 9, 1947, is broad enough to include highway patrolmen who are assigned to the Drivers' License Division of the Department of Public Safety. Under the facts set out in your inquiry, such patrolmen are, in fact, no different from other highway patrolmen. They are required to stand the same Merit System examination, physical examination, and go through the same training period. They are also commissioned as arresting officers, and may, at the discretion of the Director of Public Safety, be assigned to active patrol duty at any time. The fact that such patrolmen at a particular time may be assigned to duty in the Drivers' License Division of the Department of Public Safety is not material.

It is, therefore, my opinion that highway patrolmen who are assigned to the Drivers' License Division of the Department of Public Safety come within the meaning of the term "patrol employees of the State Highway

Patrol" used in Act 710, supra, and are, therefore, covered by the retirement system established by said Act.

The opinion rendered to Hon. Bankhead Bates, Chief, Highway Patrol, Department of Public Safety, on January 21, 1948, is hereby clarified to specifically include within the term "patrol employees of the State Highway Patrol" highway patrolmen assigned to the Drivers' License Division of the Department of Public Safety.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

January 28, 1948.

Hon. Ira S. Crowe,
Register, Circuit Court,
Chilton County,
Clanton, Alabama.

Registers—Treasurers—Chilton County—Officers and Offices.

The offices of register of the circuit court of Chilton County and treasurer of Chilton County are public offices of profit and cannot be held at the same time by one person. Constitution of 1901, Section 280; Act No. 162, Local Acts 1923, page 78.

Opinion by Assistant Attorney General Arbuthnot.

Dear Sir:

Your request for an official opinion bearing date of January 14, 1948, is as follows:

"May I ask for your ruling on the question, is it legal for a person to serve an appointment as Register in Chancery and at the same time hold the Office of County Treasurer by Election in Counties where the Register in Chancery is appointed by the Circuit Judge and the Treasurer is Elected by the People of the County.

"Thanking you very much for this and all other matters you have always been so kind to advise me about upon my inquiry."

Act No. 162, Local Acts 1923, page 78, creates the office of county treasurer of Chilton County, fixes his duties, term of office, salary, and provides for his election. Section 2 of this act is as follows:

"Section 2. That at the General Election held in this State in November, 1924, and each four years thereafter, there shall be elected by the qualified electors of Chilton County, a Treasurer of Chilton County, who shall hold office for four years from the first Monday after the second Tuesday in January next after his election, and until his successor is elected and qualified."

"Every person who is appointed or elected to perform public functions with authority derived from the State by legislative enactment prescribing his powers and authority and fixing his compensation in whatever shape is a public officer. *Mitchell v. State ex rel Welsh*, 163 Ala. 425; *State ex rel Glenn v. Wilkinson*, 220 Ala. 172; *Hard, State Comptroller v. Ex Rel Owens*, 228 Ala. 677." Quarterly Report of Attorney General, Volume 31, page 100.

It is my conclusion that the treasurer of Chilton County holds a public office.

The register of the circuit court holds a public office. Quarterly Report of Attorney General, Volume 31, page 100.

Constitution 1901, Section 280, provides, among other things, that no person shall "hold two offices of profit at one and the same time under this State, except justices of the peace, constables, notaries public and commissioners of deeds."

It is without question that both the office of register of the circuit court and treasurer of Chilton County are public offices of profit within the inhibition contained in Section 280 of the Constitution.

It is therefore my opinion that your inquiry must be answered in the negative.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

January 29, 1948.

Honorable James E. Folsom,
Governor;

Honorable Dan Thomas,
Auditor;

Honorable Haygood Paterson,
Commissioner Agriculture and Industries;
Members of the Appointing Board for Registrars,
State of Alabama,
CAPITOL.

Boards of Registrars.

Meeting dates of Boards of Registrars for all purposes discussed generally.

Opinion by the Attorney General.

Dear Sirs:

I have your letter of January 9, 1948, requesting that I furnish you certain information relative to the authorized meeting dates of the various county boards of registrars. I shall herewith set out the general law of the State governing the meeting dates of the various county boards, together with pertinent acts removing certain of the more populous counties of the State from the operation of the general law.

The general law of the State regulating and prescribing the dates of meetings of the various county boards is as follows:

Title 17, Section 76, Code of Alabama 1940, as amended by Act No. 262, General Acts 1943, page 233, which act provides that the boards of registrars in each county shall visit each precinct at least once and oftener, if necessary between October 1 and December 31, 1939, and each two years thereafter, to make a complete registration of all persons entitled to register, and shall remain there at least one half a day. It is provided by this act that the time consumed by the board in completing such registration shall not exceed thirty working days.

This act further provides that the boards of registrars in each county shall meet at the court house on the third Monday in January, 1940, and each two years thereafter, and shall remain in session ten working days for the registration of voters..

Title 17, Section 27, Code of Alabama 1940, as amended by Act No. 263, General Acts 1943, page 234, and subsequently amended by Act No. 561, General Acts 1943, page 560, provides that the county boards of registrars shall meet on the first Monday in July, 1940, and each two years thereafter, and remain in session at each of said meetings five days for the purpose of registering voters, and that the board shall meet on the first Monday in July, 1941, and each two years thereafter, and shall remain in session at each of said meetings five days for the purpose of registering voters.

Act No. 346, General Acts 1945, page 563, provides that the board of registrars of every county of the State of Alabama shall be in session at the court house, or one of the court houses, of their county on the first and third Mondays in each month for the purpose of registering all persons in the armed forces of the United States, the Merchant Marine, the Red Cross, and all other affiliated organizations, stationed or serving outside the county of their residence, and all other persons otherwise qualified under the laws of the State of Alabama to register.

It has been held by a recent opinion of this office that the registration periods authorized by Act No. 346, supra, are in addition to the

precinct registration period provided for by Title 17, Section 86, as amended, *supra*. See copy of opinion of the Attorney General rendered to Mrs. Thalia F. Pratt, Member, Board of Registrars, Pickens County, Carrollton, Alabama, under date of January 21, 1948, a copy of which is attached hereto.

However, when one of the days for registration provided for by said act coincides with one of the days for a meeting of the board of registrars provided for by some other statute, it is not to be construed as authorizing an additional working day for the board of registrars. (In this connection, it has also been held by a recent opinion of this office that when the registration days provided for by Act No. 346, *supra*, coincide with those days prescribed by law for the purging of the registration lists upon such dates the boards of registrars may also register voters. See copy of opinion of Attorney General rendered to Hon. T. C. Almon, Judge of Probate, Morgan County, Decatur, Alabama, under date of December 30, 1947, a copy of which is attached hereto.)

Title 17, Section 27, Code of Alabama 1940, as amended by Act No. 263, General Acts 1943, page 234, and subsequently amended by Act No. 561, General Acts 1943, page 560, provides that, in addition to the regular registration periods above noted, the courts of county commissioners, boards of revenue, county commissioners, or other courts of like jurisdiction of the several counties may make an order requiring the books of registration to be opened for ten working days during the month of January, 1941, and each two years thereafter.

Title 17, Section 44, Code of Alabama 1940, provides that the board of registrars of each county shall meet on the first Monday in January, 1940, and every two years thereafter, for purging the registration list, and may continue in session for one week. It has been held by former opinions of this office that the term "one week" as used in this section is composed of six working days and Sunday.—Biennial Report of Attorney General, 1934-36, page 462.

Title 17, Section 47, Code of Alabama 1940, provides that the board of registrars shall meet in each county on the second Monday in February 1941, and every two years thereafter, and may continue in session one week for the purpose of hearing objections by those persons whose names have been proposed to be stricken from the registration list.

With reference to this statute, it is important to note that it has been held by former opinion of this office that this section should be construed to read "second Monday in February 1940" instead of "second Monday in February 1941," in conformance with the evident intention of the Legislature and in derogation of the literal import of the language used. Quarterly Report of Attorney General, Volume 23, page 235. I have reviewed this opinion and am in accord with such holding.

The above statutes constitute the general law of the State relative to the meetings of boards of registrars for all purposes, and such statutes are applicable to all counties of the State except Jefferson, Mobile, Montgomery, and Tuscaloosa. Those counties will be treated below.

Jefferson County—The meeting dates for the board of registrars of this county are provided for and governed by the provisions of Act No. 668, General Acts 1947, approved October 8, 1947. This act provides meeting dates for the board of registrars of Jefferson County for all purposes.

Mobile County—All of the statutes above cited which are applicable to the counties of the State generally are applicable to Mobile County, except Title 17, Section 27, Code of Alabama 1940, as last amended by Act No. 561, General Acts 1943, page 560. This act is not applicable to Mobile County for the reason that said county is excepted from the operation thereof by virtue of its population classification.—Opinion of the Attorney General rendered to Honorable James E. Folsom, Governor, State of Alabama, Capitol, under date of December 31, 1947, a copy of which opinion has previously been furnished to each of you.

Montgomery County—The meeting dates for the board of registrars of this county for the purpose of registering voters only are provided for and governed by the provisions of Act No. 210, General Acts 1943, page 187, now codified as Title 17, Section 30(1), 1945 Cumulative Pocket Part, Code of Alabama 1940, and Act No. 346, General Acts 1945, page 563. The provisions of the general law relative to the purging of the registration list and the hearing of objections thereto (Title 17, Sections 44 and 47, Code of Alabama 1940) are applicable to this county.

Tuscaloosa County—The meeting dates for the board of registrars of this county for all purposes are provided for and governed by the provisions of Act No. 282, General Acts 1947, approved August 12, 1947.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

January 30, 1948.

Hon. Ward W. McFarland, Director,
State Highway Department,
CAPITOL.

Highways and Highway Department—Counties.

1. Under the provisions of Act No. 329, General Acts 1943, page 311, the "Farm to Market Road Act of 1943," when a county starts work on farm to market road prior to obtaining

and recording all rights of way for project, Highway Department may not reimburse county for work done prior to so obtaining and recording rights of way.

2. Under the provisions of said act, when county commences work prior to signing contract with the State Highway Department, through Bureau of County Aid, Highway Department may not reimburse county for work done prior to execution of contract.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

Your request for an official opinion bearing date of December 11, 1947, is as follows:

"Re: Farm to Market Road Act of 1943.

"An opinion is desired on the authority of the Highway Department to reimburse counties for work done under the following circumstances:

"1. When a county has started work prior to obtaining all right-of-way. (Reference is made to Section 10 of subject Act). In such event can the Department legally reimburse the county for work done before all right-of-way on the project is obtained and recorded?

"2. When a county has begun work before a contract has been executed between County and Highway Department. (Reference is made to Section 4 and Section 7 of said Act). It is customary to prepare and execute contract as soon as plans have been approved, but permission to begin work is not given until right-of-way requirements have been met. In cases where the county has begun work before the contract has been executed, (even though right-of-way requirements have been met) the question arises as to whether the Department may consider the contract retroactive to cover work done prior to its execution.

"We have two cases in which the above questions are involved. We wish to be as liberal with the counties as the law permits, but feel that we need an official interpretation of the law on these points, and will appreciate an opinion at your earliest convenience."

My answer to your first question is in the negative.

Your attention is directed to Section 10 of Act No. 329, General Acts 1943, page 311, the "Farm to Market Road Act of 1943," which reads as follows:

"§ 10. The county shall at its own expense, and without expense to the Highway Department, procure the right of way for such

roads, and the cost of right of way shall not be taken or considered as a part of the cost of construction. All deeds or other muniments or other evidence of title for right of way shall be filed and recorded in the office of the judge of probate of the county prior to the beginning of any construction of such roads."

It plainly appears from the above quoted section that work shall not be begun on farm to market roads, in which the State Highway Department participates, until all right of way deeds shall have been secured and filed for record in the office of the judge of probate of the county in which such roads are located. To reimburse a county for work on a project begun before the securing and recording by it of all right of way deeds on the project would be in clear violation of the provisions of this section. The provisions of this section are clear, plain and unambiguous and admit of no construction whatsoever.

You are, therefore, advised that, in my opinion, the State Highway Department may not reimburse a county for work done on such roads prior to the securing and recording of all right of way deeds for the project.

My answer to your second question is also in the negative. Sections 4 and 7 of Act No. 329, supra, read, respectively, as follows:

"§ 4. The State County Aid Fund shall be used exclusively for the purpose of aiding in the construction by the several counties of the State of county roads, as hereinabove defined, as follows: Any county, by proper resolution of its governing body, may make application to the Bureau of County Aid in form and manner approved by the Bureau for aid in the construction of county roads, whereupon the Chief of the Bureau of County Aid shall investigate and approve, or disapprove, such application. Upon approval of the application the county engineer of the county so applying shall make a survey and prepare such plans and specifications as the Chief of the Bureau of County Aid may require, and submit the same to him for approval."

"§ 7. Upon approval as hereinabove provided of an application by a county for aid in the construction of county roads and of the plans and specifications thereof, submitted by the county engineer, the county by and through its governing body shall make and enter into a contract with the State Highway Department through the Bureau of County Aid in form approved by the Chief of said Bureau setting forth all the terms and conditions upon which said roads shall be constructed."

It appears from Section 4, hereinabove quoted, that any county desiring to participate in the benefit of this act shall make application to the Bureau of County Aid, setting forth the survey and plans of the desired road to be constructed. It further appears, from said section, that the Chief of the Bureau of County Aid must first approve these

plans and specifications before state aid may be given for farm to market roads.

Section 7, hereinabove quoted, provides in plain terms that, upon the approval of the plans and specifications submitted by the county engineer to the Bureau of County Aid, the Chief of said Bureau shall set forth the terms and conditions upon which said road shall be constructed, and the State Highway Department and the county shall enter into a contract upon the terms stipulated by the Chief of the Bureau.

To hold that the State Highway Department could reimburse the county for work done prior to the execution of this contract and prior to the approval of the plans and specifications submitted by the county engineer to the Chief of the Bureau would, in my opinion, do violence to the letter and spirit of these two sections.

Considering the context of the act as a whole, it is my opinion that the State Highway Department may not reimburse a county for work it has done on a proposed farm to market road prior to the execution of a contract between the county and the Highway Department. So to do would, in my opinion, defeat the whole purpose of the act.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

January 30, 1948.

Hon. Frank A. Boswell, Director,
Department of Corrections and Institutions,
CAPITOL.

Costs and Fees—Committing Magistrates—Preliminary Hearings.

1. When a judge of probate or a judge of an inferior court sits as a committing magistrate in a preliminary hearing in which the defendant is subsequently convicted and sentenced to hard labor or to the penitentiary, such judge of probate or judge of an inferior court, sitting as committing magistrate, is entitled to fees for his services payable from the convict fund.

2. The schedule of fees, as set out in Title 11, Section 96, Code of Alabama 1940, is the schedule of fees to be used in determining fees due to a committing magistrate.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

Your request for an official opinion bearing date of December 11, 1947, is as follows:

"Under date of April 28, 1944, an opinion was rendered to Honorable E. P. Russell, Director of Department of Corrections and Institutions, and published in Volume 35, page 33.

"You ruled that city recorders were entitled to claim fees of Justice of the Peace, title 11, section 96, when sitting as committing magistrate in preliminary hearings.

"Would the Judge of Probate, sitting as committing magistrate in County Court be entitled to fees from the convict fund, in preliminary hearings in which the defendant was subsequently convicted and sentenced to hard labor or to the penitentiary.

"Would the Judge of an inferior court, created in lieu of Justice of the Peace Court, when sitting as committing magistrate in preliminary hearings be entitled to fees from the convict fund in instances which the defendant was subsequently convicted and sentenced to hard labor or to the penitentiary.

"If you rule in the affirmative, in both situations, would such fees be restricted to the fees as set out under title 11, section 96.

"Your official opinion on the above will be appreciated."

My answer to your first two questions as to whether or not a judge of probate or a judge of an inferior court is entitled to fees from the convict fund, where such judge of probate or judge of an inferior court sits as a committing magistrate in a preliminary hearing in which the defendant is subsequently convicted and sentenced to hard labor or to the penitentiary, is in the affirmative.

Your attention is directed to Title 15, Section 399, Code of Alabama 1940, which reads as follows:

"§ 399. Who are magistrates; authority to bind over to keep the peace.—The judges of the appellate and circuit courts, and courts of like jurisdiction, throughout the state, the judges of probate, the judges of the county courts, judges of inferior courts, and justices of the peace, in their respective counties; and the mayor or chief officer of any incorporated town or city, within the limits of their respective corporations, are magistrates within the meaning of this chapter, and authorized to require persons to give security to keep the peace in the manner provided in article 2 of this chapter."

It is to be noted, from the above quoted section, that judges of probate and judges of inferior courts are made magistrates thereby.

You refer to an opinion rendered by this office appearing in Quarterly Report of Attorney General, Vol. 35, page 33, wherein this office held that a city recorder who sat as a committing magistrate, under circumstances outlined therein, was entitled to fees for his services from the convict fund. The same reasoning, which appears in that opinion,

is applicable to a judge of probate or a judge of an inferior court when he sits as committing magistrate.

You are, therefore, advised that, under the circumstances set out in your request, a judge of probate or a judge of an inferior court is entitled to fees from the convict fund for his services for sitting as committing magistrate on preliminary hearings.

The answer to your third question is not without difficulty. I do not find anywhere in the Code a schedule of fees set up for committing magistrates who sit on preliminary hearings. However, this office has heretofore held that the schedule of fees to be used in arriving at fees due committing magistrates is the schedule of fees allowed justices of the peace, as listed in Title 11, Section 96, Code of Alabama 1940. Quarterly Report of Attorney General, Vol. 4, page 169. Opinion rendered to Hon. Roy O. Hill, Clerk, Circuit Court, Houston County, Dothan, Alabama, under date of September 24, 1947 (Ms.).

I now adhere to the former holdings of this office on this question, and you are advised that the fees payable by the Convict Department to all committing magistrates should be governed by the schedule of fees as set out in Title 11, Section 96, supra.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

February 3, 1948.

Hon. A. C. Shelton, Superintendent,
Calhoun County Schools,
Anniston, Alabama.

Schools—Funds—Bonds.

1. There is no authority of law to bond a principal of a school in order to safeguard lunchroom program money, and there is no authority of law to pay bonding premium from public school funds, if principal desires to secure own bond.

2. In the event a principal of a school checks short on his return of lunchroom school monies, it is not mandatory for the county superintendent of education to make up such shortage.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

Your request for an official opinion bearing date of January 6, 1948, is as follows:

"The principals of this county are handling large sums of money in connection with the Federal Lunch Program. This money must be safeguarded as the principals are not bonded. Is it legal to bond

the principals and pay for the bondnig fee with public school funds?
I should also like to know if it is mandatory for the superintendent to pay the shortage in case the principal should check short."

My answer to your first inquiry is in the negative.

I find no provision of law authorizing the bonding of principals of schools.

In this connection, your attention is directed to the case of **Woodruff v. Beeland**, 220 Ala. 652, 127 So. 235, wherein the Supreme Court of this State had occasion to consider the expenditure of public school funds for certain purposes. In this case, the Supreme Court set down the following principles to be followed in expending public school funds.

"An administrative board or other agency, the creature of legislation, has only the powers conferred by its creator. Every such board charged with the duty of devoting public funds to ends prescribed by law must point to a 'thus saith the law' for every disbursement.

"Unless a given charge on such fund is expressly or impliedly authorized, it cannot be lawfully incurred."

There being no expressed or implied authority for securing bonds for school principals handling lunchroom program funds, or any other funds, it necessarily follows that there is no authority of law to pay the bond premium on such bonds from public school funds.

It is my information, from the State Board of Education, that in handling federal funds for the purpose of providing a lunchroom program in the public schools, the State Board of Education enters into an agreement with the county or city board of education, as the case may be, and such federal funds are turned over to the county or city board of education. The county or city board of education, in turn, handles these funds just as other public school funds are handled.

In the event a principal of a school should check up short in his accounting for receipts from lunchrooms, it is my judgment that the county superintendent of education would not be required to make up this shortage.

I do not believe that the well known relationship of principal and agent exists between a county superintendent of education and a principal of a school. Both of these positions have been created by the legislature of this State in setting up our school system, and I do not find any provision of our school laws whereby the county superintendent of education is responsible for the defalcation of a principal of a school.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

February 5, 1948.

Hon. G. H. Stacy,
Judge of Probate, Bibb County,
Centreville, Alabama.

Counties—Paupers—Welfare—Funds.

Expense for hospitalization of an indigent person may be paid from funds of county, with the approval of the State Department of Public Welfare.

Opinion by Assistant Attorney General Sykes.

Dear Sir:

Your request for an official opinion bearing date of January 20, 1948, is as follows:

"The Welfare Department of Bibb County, has been defraying the expenses of a Tubercular patient in a state approved hospital. According to the Welfare Department's regulations, it cannot pay this expense for a period longer than 3 months.

"The Bibb County Commissioners Court is willing to assume this obligation if the law makes any provision for that type of expenditure from the General Fund.

"It would be greatly appreciated by the Commissioners Court of Bibb County, if you would advise whether or not the law makes any provision for this expenditure."

You are advised that the county governing body is authorized, with the approval of the State Department of Public Welfare, to make such expenditures from the general fund of the county, provided the patient is indigent.

Title 44, Section 18, Code of Alabama 1940, provides as follows:

"§ 18. Counties may make other provisions.—The governing body in any county shall have the power and authority, with the approval of the state department of public welfare, to make other or further provision for the care of the poor and needy of the county. The disbursement of such funds shall be made through such agencies and in such manner as may be approved by the state department of public welfare."

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

February 12, 1948.

Hon. Thomas W. Jones,
Judge of Probate,
Madison County,
Huntsville, Alabama.

Voting Machines—Challenged Votes.

1. Where voting machines are used in any county, state, or municipal election and a voter's right to vote is challenged, such vote must be cast by means of a paper ballot.

2. Records are kept of challenged votes where voting machines are used in compliance with the provisions of Title 17, Sections 188 and 189, Code of Alabama 1940.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

Your request for an official opinion, bearing date of January 17, 1948, is as follows:

"Voting Machine elections

Title 17—

Sec. 91 Sub Sec. 'd'

Sec. 97 Sub Sec. 't'

Sec. 105

Sec. 108

Sec. 112

Sec. 114

"Please give me your opinion relative to challenged voters in elections where voting machines are used;

"If such a voter votes by 'paper ballot' is it recorded on the voting machine?

"What is meant by (Title 17, Sec. 105) 'such challenged voter after first having complied with the provisions of the laws referred to in this section, shall be permitted to cast his vote on the voting machine by means of the 'irregular ballot'?

"What record and report is kept of challenged voters?"

In answer to your first question, you are advised that, due to the mechanical construction of voting machines, paper ballots used in casting a challenged vote cannot be recorded on the machine.

I have considered all of the sections of Title 17, Code of Alabama 1940, referred to in your request, in regard to the casting of challenged

votes in elections when voting machines are used. It is beyond question that the legislature, when this bill was enacted, contemplated that challenged votes would be used in those elections where the use of voting machines has been adopted. In each of these sections, the term "challenged vote" is used, and they are referred to in each instance as "irregular ballots."

Title 17, Section 108, Code of Alabama 1940, defines irregular ballots as that term is used in that section, but this section specifically exempts challenged ballots from the term "irregular ballots" defined in that section. Therefore, for this reason, I must conclude that where it is provided in the voting machine law that challenged votes are to be voted by means of "irregular ballots" must be construed to mean that challenged votes are voted in an irregular manner, in that such votes are not recorded on the voting machine.

This, in my judgment, is what is meant by the provisions of Title 17, Section 105, Code of Alabama 1940, wherein it is provided that "such challenged voter, after having first complied with provisions of the laws referred to in this section, shall be permitted to cast his ballot on the voting machine by means of the 'irregular ballot' method or by means of the device or devices specifically provided for the casting of challenged votes." As stated above, it is my opinion that the term "irregular ballots" as used in this section simply means that a challenged vote may be cast in those elections where voting machines are used by an irregular method, such vote not being recorded on the machine.

It is further my judgment that the provision of laws referred to in this section is Article 12, Chapter 1, Title 17, Code of Alabama 1940, which article deals with the method of casting challenged votes.

It is to be noted, from Sections 188 and 189 of this article, that when a person's vote is challenged, he must take and subscribe to the oath contained in these sections. It further being provided that upon these oaths being duly taken and subscribed to, the ballot of the challenged voter must be received and deposited as other ballots of qualified voters. Therefore, if the voting machines used in your county are not equipped with a box for the deposit of such challenged votes together with the subscribed oaths, then you are advised that a box may be supplied at each polling place where challenged votes may be deposited. The record of these challenged votes should be kept and preserved in the manner prescribed in Section 189, supra.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

February 16, 1948.

Hon. Wm. M. Kelly,
Chief Attorney,
Regional Office,
Veterans Administration,
400 Lee Street,
Montgomery 4, Alabama.

Trust Estates—Insurance Policies.

A life insurance policy failing to provide an Extended Insurance Option or an Endowment Option fails to meet the requirements of Act No. 430, General Acts 1943, page 399 and is, therefore, not a valid investment for the funds of wards or beneficiaries of trust estates by their guardians or trustees.

Opinion by Assistant Attorney General Hardin.

Dear Sir:

Your request for an official opinion, bearing date of January 16, 1948, is as follows:

"Act No. 430, S 103, approved July 8, 1943 (Regular Session, 1943 and Special Session 1942, Page 399) and now codified as Section 51 (1), Title 58, Code of Alabama 1940, provides that guardians and trustees are empowered to invest funds of their wards, or beneficiaries of trusts, in Life Endowment or Annuity Contracts providing certain conditions and requirements are met among which the contract must contain the following options after it has been issued for three years or less: A Cash Surrender Value Option, a Paid-up Insurance or Endowment Option, and an Extended Insurance or Endowment Option.

"On July 31, 1944, Brown Service Insurance Company issued a Special \$500 Legal Reserve Cash Policy on Catherine Roney, incompetent widow of Woodrow Roney, a deceased veteran, who is under guardianship of Lillie Mae Vaughn by appointment of the Probate Court of Houston County, Alabama, for the purpose of receiving death pension benefits payable through the Veterans Administration. A certificate duplicate of said policy (CT-2629280) is forwarded herewith for your examination and inspection and it is respectfully requested that this duplicate policy be returned to this office when it has served its purpose. In this policy Catherine Roney is the insured and her guardian, Lillie M. Vaughn who is her half-sister, is the named beneficiary.

"An examination of this policy will show that the contract meets the requirements of the above referred to statute as to the cash surrender of value option and as to the paid-up insurance option. However, it is doubtful that the requirements of the statute as to

“‘Extended Insurance or Endowment Option’ has been met inasmuch as the contract contains no extended insurance option and the endowment option contained therein cannot be exercised until the insured has attained her 85th birthday. It would appear that the remoteness of the enjoyment of this right is such as to defeat the intent of the statute that among other requirements the contract must contain ‘An Extended Insurance or Endowment Option.’

“Your opinion is respectfully requested as to whether or not an endowment right which cannot be exercised until the insured has attained her 85th birthday satisfies the requirements of the statute as to endowment option and if you are of the opinion that it does not, then at what age of the insured must this option be made available in order to satisfy the requirements of the statute.

“An opinion on the questions propounded will be very much appreciated by the Veterans Administration.”

Act No. 430, General Acts 1943, page 399, approved July 8, 1943, provides, in pertinent part, as follows:

“In addition to any other investment now permitted by law, a guardian or trustee may invest the funds of his ward or of the beneficiary of the trust in Life, Endowment or Annuity Contracts of legal reserve life insurance companies duly qualified and authorized to write such business in the State of Alabama provided, however, that the annual premium or premiums on such contracts purchased by such guardian or trustees shall not exceed 25% of the income of the ward or the beneficiary for any calendar year preceding the date of such purchase. The contract must contain the following options after it has been in force for three years or less: A CASH SURRENDER VALUE OPTION, A PAID-UP INSURANCE OR ENDOWMENT OPTION, AND AN EXTENDED INSURANCE OR ENDOWMENT OPTION. * * * *”

The policy of insurance, the subject of your inquiry, a copy of which is attached to your request for opinion, was issued upon July 31, 1944 and, therefore, the provisions of the above statute relative to the investment by a guardian or trustee of the funds of his ward or beneficiary therein must be held to be applicable thereto. You inquire as to whether this policy meets the above statutory requirements.

Act No. 430, supra, provides that such policy of life insurance to constitute a valid investment by guardians or trustees of funds of their wards or beneficiaries must contain (1) A Cash Surrender Value Option, (2) A Paid-Up Insurance or Endowment Option, and (3) an Extended Insurance or Endowment Option. An inspection of the attached policy reveals that such policy does contain a Cash Surrender Value Option and also a Paid-Up Insurance Option. However, such policy does not

contain either an Extended Insurance Option or an Endowment Option as required by the above statute.

An Extended Insurance Option, as I understand same, is a system or plan whereby, at the option of the insured, the earned cash value of such policy may be applied in payment of premiums, due on such policy insofar as such earned cash value will extend, at which time the insured may reinstate his policy of insurance by payment to the insuror of the amount of the earned cash value so used in payment of premiums due, or may terminate his contract with the insuror under the terms of the policy. That no such option is granted the insured under the terms of this policy is shown by the fact that the terms of the contract provide that "If any premium under this Policy shall not be paid when due the Policy shall lapse and the Company's liability hereunder shall cease, except as hereinbefore provided under the 'Grace Period' and the 'Paid-Up Policy' provisions and such lapse shall not be considered to have been waived by the Company in any respect by reason of the acceptance of any deposit of further premium made for the purpose of reviving this Policy."

Neither is there any Endowment Option found within the terms of this policy. Such, in my understanding, is a system or plan whereby, at the option of the insured, he may, by the payment of stipulated premiums for a designated period of time beyond the period prescribed by the terms of the policy, cause such policy to mature at a date prior to the death of the insured, at which time, the benefits of such policy become an endowment fund payable to the insured at the face value of the policy. No such provision or right is found within this policy. Neither does the fact that this policy provides as one of the terms of its agreement that such policy will automatically mature and thereby constitute an endowment fund upon the date that the insured reaches his or her eighty-fifth (85th) birthday constitute an "Endowment Option" within the meaning of the above statute. Such is no more than the designation of an automatic maturity date upon which the earned cash reserve of the policy shall equal the face value of the policy and grants no right of option to the insured.

It is, therefore, my opinion that neither of such options being incorporated within the terms of this policy, such policy fails to meet the requirements of Act No. 430, supra, and is, therefore, not a valid investment for the funds of wards or beneficiaries of trust estates by their guardians or trustees.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

February 16, 1948.

Hon. H. W. Clayton,
Judge of Probate,
Marshall County,
Guntersville, Alabama.

Preliminary Hearings—Court Reporters—Committing Magistrates—Counties.

1. The duty to take testimony at preliminary hearings is upon the magistrate. Title 15, Section 135, Code of Alabama 1940.

2. The county is not authorized to pay a stenographer or reporter taking testimony at preliminary hearings.

Opinion by Assistant Attorney General Sykes.

Dear Sir:

Your request for an official opinion, dated January 22, 1948, is as follows:

"As Probate Judge of Marshall County, I am required by law to hold preliminary hearings in felony cases when presented to me. Some of these cases, as you know, are lengthy; that is, the testimony taken. This testimony is required by law to be taken down and preserved. We have a large number of them, and up until this time, I have been paying the reporter to take the testimony, which is very expensive on me.

"I want to know if there is any provision made by law whereby Marshall County can pay a reporter to take down the testimony before me on such preliminary hearings in felony cases, and if so, just how and from what funds should that be paid.

"Please give me this information at your earliest convenience."

I find no authority of law for the county to pay a court reporter to take testimony at a preliminary hearing. Biennial Report of Attorney General, 1928-1930, page 1025 (holding that the duty to reduce testimony to writing at preliminary hearings is on the magistrate, and that there is no authority for paying a reporter (see Title 15, Section 135, Code of Alabama 1940).

Costs and fees for preliminary trials are provided for in Title 11, Section 84, Code of Alabama 1940, as amended by Act No. 58, General Acts 1945, page 59, approved June 1, 1945.

Very truly yours,

A. A. CARMICHAEL,
Attorney General.

February 16, 1948.

Hon. M. R. Joiner,
Register, Circuit Court,
Talladega County,
Talladega, Alabama.

Bonds—Intoxicating Liquors—Condemnation—Fines and Forfeitures—Costs and Fees.

Proceeds from forfeiture on forthcoming or replevy bond executed under Title 29, Section 249, Code of Alabama 1940, should be distributed as if sale of condemned property had taken place, as provided in Title 29, Section 251, Code of Alabama 1940, as amended by Act No. 126, General Acts 1947 (Ms.), approved July 17, 1947.

Opinion by Assistant Attorney General Sykes.

Dear Sir:

Your request for an official opinion dated January 12, 1948, is as follows:

"On December 22, 1947, I wrote your office for your official opinion on the following question:

"Under a decree of condemnation, the Register of this Court was ordered to sell a car for the transportation of intoxicating liquors. On the day set for and so advertised for the sale of said condemned car, the car was not available, and later the Sheriff declared a forfeiture of the bond covering said car. The Register issued an execution and the Sheriff paid into Court, the sum of \$400.00, the amount of the bond.

"How shall I, as Register, distribute this amount of \$400.00? Shall the distribution be made as if a sale of the car had been had, or in some manner otherwise?"

"Not having heard from your office answering the above, I presume by now that the letter was misplaced or lost in the mails, and I respectfully request your official opinion. Judge Lamar Field suggested that I secure your opinion before making any distribution of this sum."

In my opinion, the proceeds from the forfeited bond should be distributed as if a sale had taken place. When a vehicle is seized under the prohibition laws of this State, the defendant in the proceedings or the claimant to the property may execute a forthcoming or replevy bond, conditioned that in the event the property is condemned it will be delivered to the sheriff within fifteen days from the judgment of condemnation. Title 29, Section 249, Code of Alabama 1940. When this

bond is executed, the sheriff is authorized to deliver the property to the defendant or claimant pending decree of the court.

Title 29, Section 249, Code of Alabama 1940, provides for the forfeiture of said bond, and the issuance of execution against principal and sureties in the event the decree of condemnation is entered and the property is not delivered within the prescribed time. The statute, Title 29, Section 249, Code of Alabama 1940, does not provide specifically for the disposition of the proceeds of the bond.

Ordinarily, in cases of this type the automobile or other vehicle is sold and the proceeds of the sale are distributed in accordance with Title 29, Section 251, Code of Alabama 1940, as amended by Act No. 126, General Acts 1947 (Ms.), approved July 17, 1947.

In my judgment, the bond authorized by Title 29, Section 249, Code of Alabama 1940, is to insure the delivery of the property to the sheriff for sale. But for the law authorizing the execution of the bond, the vehicle or conveyance would be held by the sheriff until a decree of the court condemned the automobile or returned it to its owner. At the time that it is known that a condemned automobile cannot be returned to the sheriff under the terms of the bond executed under Title 29, Section 249, Code of Alabama 1940, several items of cost and fees have accrued. See Title 29, Section 251, Code of Alabama 1940, as amended by Act No. 126, supra. In my judgment, the legislature intended that these items of cost and fees should be paid from the proceeds of the sale.

In my judgment, when the costs and fees and distribution of the proceeds cannot be paid or made from the sale of condemned property by reason of the fact that the property is not made available to the sheriff in accordance with the conditions of the bond, then the proceeds from the forfeited bond should be treated as proceeds from the sale of the vehicle.

In so holding, I am aware of the fact that fines and forfeitures are required to be paid into the fine and forfeiture fund of the county when there is no other provision for the distribution of such fines and forfeitures. Title 1', Section 392, Code of Alabama 1940. I cannot believe, however, that the legislature intended that the proceeds of the bond executed under Title 29, Section 249, Code of Alabama 1940, should be paid into the fine and forfeiture fund of the county. If this were done, there would be no provision for paying court costs in the condemnation case, the advertising costs, the costs of seizure, and of keeping the property pending the proceedings; neither would there be any source for paying the officer making the seizure or furnishing the proof.

It may result in some cases that the vehicle or automobile may be recaptured after the bond referred to in your inquiry is forfeited and the proceeds distributed. In such event, the fact that the bond was forfeited would probably not prevent a later sale of the automobile which

had been condemned. The question of how to distribute the proceeds from such sale can be answered when it arises.

Very truly yours,

A. A. CARMICHAEL,

Attorney General.

February 17, 1948.

Honorable Clifton C. Cobb,

Executive Secretary,

Board of Registration for Professional Engineers

and Land Surveyors,

Montgomery, Alabama.

Engineers and Land Surveyors—Fees.

1. A certificate of registration, allowed to expire by reason of not effecting a renewal thereof under Title 46, Section 144, Code of Alabama 1940, as amended by Act No. 543, General Acts 1943, p. 525, becomes invalid.

2. A registered engineer, whose certificate so expires, must make a new application for registration and meet statutory requirements prerequisite to granting a certificate of registration, and must pay initial registration fee.

Opinion by Assistant Attorney General Screws.

Dear Sir:

Your request for an official opinion, bearing date of December 18, 1947, is as follows:

"Section 144, Title 46, Chapter 7, 1940 Code of Alabama provides for the expiration and renewal of certificate of registration.

"Section 140, of the above mentioned Code, stipulates the general requirements for registration.

"Section 12, Act No. 271 of Alabama General Laws, (Regular Session 1935) otherwise known as the original registration law, provided the general requirements for registration at that time.

"This original act contained the so-called 'Grand-father Clause' that made provision for registration of non-graduates without passing a written examination. This so-called 'Grand-father Clause' expired after five years. The present law under which we are now

operating requires a non-graduate applicant to pass a written examination.

"We have a request from a former non-graduate registrant, who was registered under the original 'Grand-father Clause' but allowed his registration to expire by the non-payment of his yearly renewal fee.

"An opinion is requested as to whether this former registrant shall be required to pass a written examination before he can be restored as a registered engineer, and what fees should be collected from the applicant to restore him to a status of registration in good standing."

I am of the opinion that the first part of your inquiry should be answered in the affirmative.

The statutory provisions governing Engineers and Land Surveyors is found in Title 46, Chapter 7 (Sections 129-150), Code of Alabama 1940, as amended in part by Act No. 543, General Acts 1943, page 525. Section 144 of said title, as amended, provides as follows:

"§ 144. Expirations and renewals.—Certificates of registration shall expire on the last day of the month of December following their issuance or renewal and shall become invalid on that date unless renewed. It shall be the duty of the secretary of the board to notify, at his last registered address, every person registered under this chapter, of the date of the expiration of his certificate and the amount of the fee that shall be required for its renewal for one year; such notice shall be mailed at least one month in advance of the date of the expiration of said certificate. The board shall, each year, prior to issuing renewal notices for the ensuing year, fix the annual renewal fee for certificates of registration which fee shall not exceed the sum of five dollars. Renewal of certificates of registration for the following year may be effected at any time during the month of December of the year in which such certificate has been issued or renewed by the payment of the renewal fee so fixed by the board. Such certificates may also be renewed during the ensuing ten months by the payment of an additional fee of fifty cents for each month, or fraction thereof that payment of the fixed renewal fee is delayed beyond the month of December. The board, in its discretion, may make an exception to the foregoing renewal provisions in the case of a person who is in the armed service of the United States." (Emphasis supplied.)

In construing the above, this office has heretofore held that the right to renew a certificate expires at the end of the tenth month following the December in which the renewal could have first been effected. The Legislature, by providing this ten-months' period of grace, with a penalty of an additional fee of \$.50 for each month, expressly established

the period in which renewal could be effected, and the Board is without authority, and the registrant is without the right, to effect a renewal after the expiration of the ten-months' period.—Quarterly Report of Attorney General, Volume 33, page 44.

From the above, it follows that if one allows his certificate to expire absolutely, the same becomes invalid for all intents and purposes. He is in the status of one who has never registered. And, therefore, in order to be entitled to registration he must make an original application and meet the statutory requirements prerequisite to the granting of a certificate of registration, as provided for in Title 46, Section 140, as amended, *supra*.

In answer to the second part of your inquiry, it is my opinion that the applicant in question, when he again qualifies for registration, should pay the initial registration fee of twenty-five dollars, fifteen dollars of which shall accompany the application and the remaining ten dollars to be paid before issuance of certificate, as provided for in Title 46, Section 141, as amended.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

February 17, 1948.

Hon. John Graves,
State Comptroller,
Department of Finance,
Division of Control and Accounts,
CAPITOL.

Acting Solicitors—Compensation.

1. When an attorney is appointed to serve in the absence of a circuit solicitor, under the provisions of Act No. 503, General Acts 1945, page 728, approved July 9, 1945, such attorney should be paid \$25.00 per day as set out in said act.

2. Under above circumstances, the provisions of Title 41, Chapter 4, Article 1, Section 149, Code of Alabama 1940, have no application.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

Your request for an official opinion bearing date of January 5, 1948, is as follows:

"I am in receipt of a certificate made pursuant to the General Acts of the 1945 Legislature, page 728, approved July 9, 1945, supporting claim by Hon. Jim McKenzie Long who was appointed Acting Solicitor of the 10th Judicial Circuit of Alabama until the vacancy was filled by the Governor on December 5th. This certificate states that Jim McKenzie Long was engaged in court for four days under this appointment.

"Chapter 4, Article 1, Title 41, Section 149, Code of Alabama 1940, provides 'The Succeeding officer is entitled to the salary for the day upon which he is inducted into office, to the exclusion of the retiring officer.'

"Section 2 of Act No. 503 provides 'That the attorney so appointed shall receive for his services the sum of \$25.00 per day for the time he is actually engaged in court to be paid on the warrant of the comptroller if the solicitor for whom he is appointed to act is paid by the state,'

"Please furnish me with your official opinion as to which rate of pay should be used in calculating payment for this employment; i. e., the salary rate of the solicitor of the 10th Judicial Circuit, or the \$25.00 per day rate specified in Section 2 as quoted above.

"In view of Title 41, Section 149, *supra*, would Jim McKenzie Long receive pay for the date of December 2nd to the exclusion of R. E. McAdory, deceased Solicitor, and, further, would the appointee of the Governor on December 5th receive pay for that day to the exclusion of Jim McKenzie Long, Acting Solicitor?"

In answer to your first inquiry, you are advised that Mr. Long should be paid at the rate of \$25.00 per day for the time he was actually engaged under his appointment as solicitor.

Section 1 of Act No. 503, General Acts 1945, page 728, approved July 9, 1945, provides that if the circuit solicitor, county solicitor, deputy solicitor, assistant solicitor, or assistant deputy solicitor, regularly required by law to prosecute cases in the circuit court, is absent for any reason, or where there is a vacancy in said office for any cause, then the presiding judge of that circuit court may appoint a competent attorney to act in the solicitor's place.

You state in your request that Mr. Long was appointed under the provisions of this act, such appointment being necessary due to the unfortunate death of the Honorable Robert E. McAdory, former Solicitor of Jefferson County.

Section 2 of Act No. 503, *supra*, specifically provides that such attorney appointed in the place of the solicitor shall receive for his services the

sum of \$25.00 per day for the actual number of days he is engaged in court, and shall be paid by the county the sum of \$25.00 per day for his services for the time he is actually engaged in court. However, you are not concerned with this latter \$25.00, as it is provided in said act that it shall be paid on a warrant of the probate judge or other proper officer of the county.

Title 41, Section 149, Code of Alabama 1940, provides that "The succeeding officer is entitled to the salary for the day upon which he is inducted into office, to the exclusion of the retiring officer."

This section undoubtedly contemplates that it is applicable only when an officer's term has expired, or when there is a vacancy in an office and the Governor or other proper appointing official appoints someone to fill out the unexpired term in the office. It has no application whatsoever to temporarily appointed attorneys to act in the stead of a solicitor when such an appointment is made under the provisions of Act No. 503, supra.

You are, therefore, advised that the inquiry posed in your second question cannot arise, for Mr. Long will receive pay under the provisions of Act No. 503, supra, and not under Section 149, supra, and there can be no contention that Mr. Long would be entitled to pay for December 2, to the exclusion of McAdory, for Mr. Long was not appointed by the Governor to fill out the unexpired term occasioned by Mr. McAdory's death. Neither could any question arise as to the pay due Mr. Long or the person appointed by the Governor on December 5, to fill this vacancy. As stated above, Mr. Long is paid under the provisions of Act No. 503, supra, for the days he was actually engaged in court, and Section 149, supra, has no application whatsoever to Mr. Long.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

February 17, 1948.

Hon. Ward W. McFarland, Director,
Highway Department,
State of Alabama,
CAPITOL.

Motor Vehicles—Trucks—Trailers.

1. Special permits cannot be issued to cover operation of oversized, overweight or over length motor vehicles operated regularly on a continuing commercial basis and hauling loads

which can be reasonably dismantled. Title 36, Section 91, Code of Alabama 1940.

2. Loads consisting of automobiles and house trailers are loads which can be "reasonably dismantled" and if oversize or overweight such loads cannot regularly be hauled under special permits. Title 36, Section 91, Code of Alabama 1940.

Opinion by Assistant Attorney General Barton.

Dear Sir:

Your request for an official opinion, dated November 13, 1947, is as follows:

"Under Title 36, Chapter 3, Article 2, the maximum dimensions and gross weight of motor vehicles is fixed as follows:

Length, Single Unit	35 feet
Length, Semi-Trailer	45 feet
Height	12½ feet
Width	96 inches

Under same Title, Chapter and Article, Section 90, provision is made for the Highway Director to issue special permits for overlength, over width, or over height commodities that cannot be reasonably dismantled to come within the limitations as set out in the above named statute.

"Several transportation companies have constructed special equipment for hauling motor vehicles, several of these trucks so equipped hauling trucks and automobiles exceed the legal height, that is, twelve one-half feet, by six or eight inches.

"Another transportation company hauling two house trailers on special equipment exceeds the legal length by ten feet. Both of these companies have been arrested and fined in several different cases.

"The transportation companies involved have requested this Department to issue special permits, one company asking that they be allowed to haul four automobiles on one truck and trailer with a special frame on the trailer permitting two cars to be arched over, two cars loaded flat on the trailer. In the case of the house trailers, these trailers are both loaded flat on the trailer and does not exceed any limitation except length which is fifty-five feet.

"I will thank you for your opinion as to whether or not this Department can legally issue a special permit, first, in the case of

automobiles, loaded as above described, being thirteen feet high, and second, in the case of house trailers loaded one behind the other making the total length fifty-five feet."

The section to which you refer is Title 36, Section 91, Code of Alabama 1940, which reads in part:

"The director of the highway department may issue special permits, without cost to the applicant therefor, in isolated cases only, for movement of oversize, overweight, or over length commodities, which can not be reasonably dismantled, and for the operation of such super-heavy or oversized motor trucks, or semi-trailers, whose gross weight, including loads whose height, width or length may exceed the limits prescribed in this article, or which in other respects fail to comply with the requirements of this chapter, as may be reasonably necessary for the transportation thereof; . . ." (Emphasis Supplied.)

In my opinion, "in isolated cases only" means only in unusual, exceptional, rare or individual cases. Its connotation is that special permits shall not regularly be issued to cover a regular and continuing circumvention of the sound public policy prohibiting the operation of oversized, overweight or over length vehicles. Thus, special permits are to be issued only in extraordinary situations, and not as a means of exempting regular commercial trucking concerns from the statutory limitations.

From your presentation of the facts, it is my conclusion that in these two particular instances you have involved a regular situation in which commercial haulers have, for reasons of economy and in order to operate under a more favorable tariff, adopted oversized or over length vehicles in furtherance of continuing transportation operations. I am, therefore, of the opinion that these two instances cannot be classified as "isolated cases only," and that you have no authority under Title 36, Section 91, *supra*, to issue special permits to cover such regular operations. *CF.* Quarterly Report of Attorney General, Vol. 18, page 151, which opinion was written under Act No. 484, General Acts 1939, page 687, approved September 19, 1939, and is hereby modified to the extent that the adoption of the 1940 Code changed the wording of the statutory law. The Report of the Code Committee to the Legislature, pages 397 and 398, shows that the 1932 Act, page 70, and the 1939 Act, page 688, were revised by the Code Committee.

I am of the further opinion that a 55-foot load consisting of two house trailers and a load of 13 feet high consisting of four automobiles loaded in two tiers are loads which can be "reasonably dismantled." I find in economic desirability or competitive necessity no justification for the construction and use of motor equipment which exceeds the statutory limitations. Thus, the fact that existing rate structures are more favorable to heavier loads does not, in my judgment, force the conclusion that oversized loads are necessarily loads which cannot be "reasonably dismantled." A higher tariff may result from dismantling, but as I read

the statute any oversized load which is physically capable of being "reasonably dismantled" must be reduced to the extent necessary to meet the statutory limitations.

If these wise limitations be corroded by gradual encroachments, motor transportation companies may eventually seek to load automobiles in three tiers instead of the present two, and build and operate semi-trailers which will load three house trailers instead of the present two. So long as existing limitations are in force, they must be observed; if commercial transportation interests feel that they are too restrictive, that is a matter to be addressed to the sound discretion of the Legislature. Likewise, if existing tariffs are too discriminatory as against loads meeting the present size and weight limitations, an adjustment of those tariffs should be sought through the proper state and federal tariff regulatory bodies. In my judgment the problem, which involves a balancing of public and private interests, cannot be circumvented by resorting to the "special permit clause" of Title 36, Section 91, *supra*.

Each of your questions is therefore answered in the negative.

Very truly yours,

A. A. CARMICHAEL,
Attorney General.

February 18, 1948.

Hon. Bert E. Thomas, Director,
Department of Conservation,
CAPITOL.

Contracts—Department of Conservation does not have authority to pay defaulted contractor after default for work done up until the time he defaulted on the contract.

Opinion by Assistant Attorney General Kohn.

Dear Sir:

Your request for an official opinion bearing date of February 4, 1948, is as follows:

"On the 28th day of August, 1947, the Department of Conservation awarded a contract on a low bid to clear certain land in Crenshaw County, Alabama, which had been heretofore deeded to the Department as a public fishing lake. The clearance of the ground was in accordance with specifications designed by the engineer in charge. The contractor was awarded the bid of \$3,000 and was given 60 working days for completion of the job. On the 1st day of December, 1947, the job had only been 20 per cent completed, and

notice was given to the Department that the contractor could not complete the work. The grounds specified for non-fulfillment of the contract was that his bid was too low. The job was awarded to the second low bidder in the amount of \$4,800. This bidder allowed the State \$600 for the work which the original bidder did on the job and reduced his bid to 4,200. The original bidder thinks that the State should reimburse him for the amount of work actually done. The Department is willing to pay a reasonable amount for this work, but we do not think it advisable or just to pay the amount claimed in full. Certainly the original contractor should be penalized for non-fulfillment of the contract and for the delay which this caused.

"We would like your official opinion as to whether or not the Department may legally adjust this matter with the original contractor, and pay to him an agreed sum for the work which he did under his contract and for which the State derived a certain amount of benefit.

"Your usual prompt attention in handling such matters will be deeply appreciated."

In my opinion the Department of Conservation at this time does not have authority to pay the original contractor, who defaulted on his contract, any money for the work that he performed on the contract before he defaulted. To hold otherwise would be to put a premium on defalcation. The Department should proceed against the first contractor for breach of contract for the difference between the two contracts, less \$600.00, that is \$4800.00 minus \$3600.00 or \$1200.00 plus the damages that the State has incurred by the delay.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

February 18, 1948.

Hon. Haygood Paterson, Commissioner,
Department of Agriculture and Industries,
CAPITOL.

Alabama State Markets Board—Agriculture and Industries—
Funds.

1. Under Act No. 32, General Acts 1943, page 25, as amended by Act No. 285, General Acts 1945, page 472, all collections by the Alabama State Markets Board of charges made by it for the use of its markets and facilities should have been deposited monthly in the State Treasury to the credit of the Agricultural Fund, identified therein as the State Markets Fund, and ear-

marked solely for payment of the expenses of operation and maintenance of said board and liquidation of costs of construction of such markets and facilities.

2. Under Act No. 687, General Acts 1947 (Ms.), approved October 9, 1947, and effective October 1, 1947, all collections of such charges made by the Alabama State Markets Board shall be paid monthly into the general fund until that fund is reimbursed for the \$60,000.00 appropriated therefrom by said act to the Alabama State Markets Board for the purpose of completing and equipping its present market facilities.

3. The expenses, salaries, operation, and maintenance of the Alabama State Markets Board for the fiscal years ending September 30, 1948, and September 30, 1949, shall be paid from the sum appropriated for such purposes by Section 1, Subsection XI, of Act No. 320, General Acts 1947 (Ms.), approved August 15, 1947, and effective October 1, 1947.

Opinion by Assistant Attorneys General Barton and Garrett.

Dear Sir:

Your request for an official opinion, dated October 27, 1947, is as follows:

"The Markets Board Act No. 32 on page 25 of General Acts of Alabama, Regular Session of 1943 provides in Section 4, as follows:

"All collections of such charges shall be deposited monthly in the State treasury to the credit of the Agricultural Fund as now defined by law, and shall be used solely for payment of the expenses of operation and maintenance, and liquidation of costs of construction of such markets and facilities, upon requisition, as hereinafter provided, upon the State Comptroller and to be paid by the warrant of the comptroller upon the treasury."

"The Examiners of Public Accounts have recently examined the books of the Markets Board. The Examiners find that all collections of such charges which have been made have been deposited in the State **MARKETS BOARD FUND** and have been expended by the Director of the Markets Board for general purposes.

"The question is whether these charges when collected should not be turned over to the Commissioner of Agriculture to be deposited to the credit of the Agricultural Fund as set forth under Section 31, Article 4, Title 2, Code of Alabama of 1940.

"The Legislature recently passed Act No. 687 (H. 197, approved October 9, 1947, copy of which is hereto attached). Under the pro-

visions of this Act \$60,000.00 is appropriated from any funds in the State Treasury not otherwise appropriated, to the use of the Alabama State Markets Board for the purpose of completing and equipping present market facilities. It is provided, that the Alabama State Markets Board shall reimburse the general fund, by paying into the general fund each month all moneys collected and received by the Board from Markets built by it.

"Does not this Act constitute a prior lien on these charges?"

Answers to your inquiries necessitate a consideration of Act No. 32, General Acts 1943, page 25, as amended by Act No. 285, General Acts 1945, page 472, Act No. 320, General Acts 1947 (Ms.), approved August 15, 1947, and effective October 1, 1947 (the general appropriation act for the fiscal years ending September 30, 1948, and September 30, 1949), and Act No. 687, General Acts 1947 (Ms.), approved October 9, 1947, and effective October 1, 1947.

The Alabama State Markets Board was created by Act No. 32, *supra*, Section 4 of which reads as follows:

"All collections of such charges shall be deposited monthly in the State treasury to the credit of the Agricultural Fund as now defined by law, and shall be used solely for payment of the expenses of operation and maintenance, and liquidation of costs of construction of such markets and facilities, upon requisition, as hereinafter provided, upon the State Comptroller and to be paid by the warrant of the comptroller upon the treasury."

The "such charges" referred to therein are the charges made by the board for the use of the markets and facilities operated and maintained by it. The effect of Section 4, *supra*, was to require that all collections of such charges should be deposited monthly in the State Treasury to the credit of the Agricultural Fund and earmarked "solely for payment of the expenses of operation and maintenance, and liquidation of costs of construction of such markets and facilities, * * *." The monies so paid into such fund could not be used for the general purposes for which said fund is created. See Quarterly Report of Attorney General, Volume 15, page 241, and compare Quarterly Report of Attorney General, Volume 34, page 27. That this was the intention of the legislature is obvious from the fact that in Act No. 285, *supra*, which amended Section 6 of Act No. 32, *supra*, these monies are referred to as "the State Markets Fund."

Reading the two acts together, I am convinced that it was the intention of the legislature that all collections of charges made by the Alabama State Markets Board for the use of its markets and facilities should be deposited monthly in the State Treasury to the credit of the Agricultural Fund, and earmarked only for the purposes set forth in

Section 4, *supra*. By the reference in Act No. 285, *supra*, to "the State Markets Fund," this part of the Agricultural Fund was more specifically identified as "the State Markets Fund." The administration of such fund is vested exclusively in the Alabama State Markets Board created by Act No. 32, *supra*, subject to the limitations contained in that act and subsequently enacted legislation pertinent thereto; and the State Board of Agriculture and Industries has no supervision or control whatsoever over the same.

Act No. 687, *supra*, which became effective on October 1, 1947, provides as pertinent:

"Section 1. The sum of sixty thousand dollars (\$60,000.00) is hereby appropriated from any funds in the State Treasury not otherwise appropriated, to the use of the Alabama State Markets Board for the purpose of completing and equipping present market facilities. It is provided, that the Alabama State Markets Board shall reimburse the General Fund, without interest, by paying into the General Fund each month all moneys collected and received by th Board from markets built by it."

There appears to be no doubt that the phrase "all moneys collected and received by the Board from markets built by it," used therein, means "all collections of such charges," i. e., charges by the board for the use of its markets and facilities, used in Section 4 of Act No. 32, *supra*.

The effect of the last sentence of Section 1 of Act No. 687, *supra*, is to supersede Section 4 of Act No. 32, *supra*, which requires that all such collections shall be deposited in "the State Markets Fund" of the Agricultural Fund to be used "solely for payment of the expenses of operation and maintenance, and liquidation of costs of construction of such markets and facilities," and to require that all such collections be paid each month into the general fund until the general fund is thereby fully reimbursed for the \$60,000.00 appropriated therefrom by Act No. 687, *supra*, to the Alabama State Markets Board for the purpose of completing and equipping present market facilities. This was within the legislative competence.

It may be argued that the legislature could not have intended by Act No. 687, *supra*, that all current collections of charges for the use of markets and facilities of the Alabama State Markets Board should be devoted exclusively to the reimbursement of the general fund, because the board would then have no funds with which to continue the operation and maintenance of its markets and facilities. However, the legislature has otherwise provided for the operation and maintenance of such facilities. This was done by Act No. 320, *supra*, effective October 1, 1947. I quote as pertinent from Section 1, Subsection XI, of said act, as follows:

"For the payment of the expenses, salaries, operation and maintenance of the Alabama State Markets Board, there is hereby ap-

appropriated for each of the fiscal years ending September 30, 1948 and September 30, 1949 the sum of \$20,000.00 to be paid out of monies in the Agricultural Fund as provided in Title 2, Article 4 of Chapter 1 of the 1940 Code of Alabama, and the expenditures shall conform to the provisions of Article 3, Chapter 4, Title 55, Code of Alabama, 1940."

This statute, making a specific appropriation for the payment of the expenses, salaries, operation, and maintenance of the Alabama State Markets Board for these two fiscal years, was doubtless intended as a substitute during the time which, by its own terms, it remains in effect, for Section 4 of Act No. 32, supra, to the extent that it authorizes the use of the monies in "the State Markets Fund" of the Agricultural Fund for payment of the expenses of operation and maintenance. *Riggs v. Brewer*, 64 Ala. 282.

These conclusions are reinforced by the fact that Acts No. 687 and 320, supra, were passed at the same session of the legislature and became effective the same day.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

February 18, 1948.

Hon. J. T. Jackson,
President, Board of Commissioners,
City of Jasper,
Jasper, Alabama.

Municipal Corporations—Taxation—Bonds.

A municipality may voluntarily redeem with its unencumbered general funds special assessment public improvement bonds which remain overdue and unpaid because of a deficiency in the original assessment against abutting property.

Opinion by Assistant Attorney General Barton.

Dear Sir:

Your request for an official opinion, dated January 3, 1948, is as follows:

"About the year 1921 the City of Jasper adopted paying ordinances numbered 1, 4 and 8, and possibly some other numbers, under which provision was made for paving streets in Jasper and making assessments against the abutting property. Some of the property abutting

upon the improved streets was owned by the county and some owned by the Federal Government, which is covered by the postoffice building. Assessments could not legally be made against that property and, therefore, there was a shortage of money available to pay the cost of improvement.

"Some of the improvement bonds were owned by First National Bank of Jasper and some by the Bank of Oakman and about 1931 the City paid to them out of its general fund the amount necessary to make up the full face value of their bonds and the interest thereon.

"There are two of such bonds now outstanding which are held by Miss Mable O'Rear of Jasper, upon which a balance is due, and there is no fund from paving assessments available for their payment. The City of Jasper feels that they should be paid by the City out of its general funds or any other funds available and would like to have your opinion as to whether or not the City can lawfully make such payment. Our understanding is that the City is free to do it, but, before taking action, we would like to have your opinion and will appreciate a prompt response as is reasonably convenient to you.

"If it should develop that any other bonds of the nature above mentioned are outstanding, your opinion, of course, would cover them also."

In my opinion there is no provision of law which would prevent the City of Jasper from voluntarily redeeming, with surplus monies in its General Fund, such unpaid special assessment street improvement bonds.

Since the date of your request, you have submitted for examination one of the bonds in question. It is noted that these bonds were issued on May 16, 1921 by the City of Jasper under the authority of Section 1411, Code of Alabama 1907 (Title 37, Section 293, Code of Alabama 1940) for the purpose of paving city streets, the bonds maturing in ten years and carrying an 8% annual interest charge. It is further noted that these bonds are not general obligation bonds of the City of Jasper, but are special assessment bonds "payable solely from the said assessments" and that security for their payment is limited solely to a lien against the property improved. The bonds carry that message upon their face.

It is clear that there rests upon the City of Jasper no legal obligation to redeem these bonds. The bond holders have no right of action against the city for any deficiency. *Steiner v. Town of Capitol Heights*, 213 Ala. 539, 105 So. 682; *Bankhead v. Town of Sulligent*, 229 Ala. 45, 155 So. 869.

However, although no legal obligation rests upon the city, in my judgment there exists no constitutional or statutory inhibition against the city voluntarily redeeming matured and unpaid bonds out of surplus and unencumbered monies in its General Fund. Neither the Constitution nor other legal enactment prohibits the city from voluntarily using unencumbered funds from any source to pay the bonds. *Kendrick v. City of Birmingham*, 242 Ala. 112, 5 So. 2d 82; *Wheelis v. Phenix City*, 241 Ala. 310, 2 So. 2d. 776; *Bankhead v. Town of Sulligent*, *supra*.

Therefore, your question is answered in the affirmative.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

February 18, 1948.

Hon. Arch B. Ferrell, Solicitor,
Twenty-Sixth Judicial Circuit,
Russell County,
Phenix City, Alabama.

Solicitors—Officers.

Circuit Solicitor of the Twenty-Sixth Judicial Circuit of Alabama, appointed under the provisions of Act No. 378, General Acts 1947 (Ms.), approved August 16, 1947, holds office until midnight of the first Monday after the second Tuesday in January, 1951, and until his successor is elected and qualified.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

Your request for an official opinion bearing date of January 27, 1948, is as follows:

"As Solicitor for the Twenty-Sixth Judicial Circuit of Alabama, I wish to request your advice and opinion as to how long I shall be legally entitled to hold this office.

"As you know, the Twenty-Sixth Judicial Circuit was created by an Act (No. 378) of the Regular Session, 1947, of our Legislature (S. 141—Fite), approved August 16, 1947, a copy of which said Act is attached hereto.

"Of course, it is clear that the Judge for our Twenty-Sixth Circuit will hold office until the general election for State Offices this year and until his successor shall have been elected and qualified.

This is in accordance with the express provisions of Section 159 of our State Constitution and with the express provisions of Section 3 of the Act itself.

"Section 159, State Constitution:

"'Whenever any new circuit or chancery division is created the judge or chancellor therefor shall be elected at the next general election for any state officer for a term to expire at the next general election for circuit judge and chancellors; provided that if said new circuit or chancery division is created more than six months before such general election for any state officer, the governor shall appoint some one as judge or chancellor, as the case may be, to hold the office until such election.'

"Under Section 4 of this Act, which provides that 'except as hereinafter provided, within thirty days after the passage and approval of this Act, the Governor shall appoint the Circuit Solicitors in the new circuits created whose term of office shall begin on the first day of the month immediately after appointment and qualification, and who shall hold office until their successors shall have been elected and qualified,' on August 29, 1947, Governor Folsom appointed and commissioned me Solicitor for the Twenty-Sixth Judicial Circuit, 'to have and to hold the said office, together with all the Rights, Powers and Emoluments to the same belonging or in anywise lawfully appertaining, during the term prescribed by the Constitution and Laws of the State of Alabama, if you shall so long demean yourself well.'

"Thus, my question is this: When, under the Constitution and Laws of the State, shall my successor be elected and qualified?"

In answer to your inquiry, it is my opinion that you hold your office until midnight of the first Monday after the second Tuesday in January, 1951, and until your successor is elected and qualified.

Section 167 of our State Constitution provides:

"A solicitor for each judicial circuit or other territorial subdivision prescribed by the legislature, shall be elected by the qualified electors of those counties in such circuit or other territorial subdivision in which such solicitor prosecutes criminal cases, and such solicitor shall be learned in the law, and shall at the time of his election and during his continuance in office, reside in a county (in the circuit) in which he prosecutes criminal cases, or other territorial subdivision for which he is elected, and his term of office shall be for four years, and he shall receive no other compensation than a salary, to be prescribed by law, which shall not be increased during the term for which he was elected; provided, that this article

shall not operate to abridge the term of any solicitor now in office; and, provided further, that the solicitors elected in the year nineteen hundred and four shall hold office for six years, and until their successors are elected and qualified; and provided further, that the legislature may provide by law for the appointment by the governor or the election by the qualified electors of a county of a solicitor for any county." (Emphasis supplied.)

Under these provisions, it appears to have been intended that a solicitor for each judicial circuit should be elected in 1904, to serve for a term of six (6) years, and that in 1910, and every four (4) years thereafter, a solicitor for each circuit should be elected. The intent that, after 1910, a solicitor for every circuit should be elected every four (4) years seems to be expressed in at least three of our statutes.

Title 13, Section 225, Code of Alabama 1940, provides as follows:

"How solicitors selected.—At the general election held on the first Tuesday after the first Monday in November, 1942, and every four years thereafter, there shall be elected a solicitor for every judicial circuit in this state who shall hold office for the term of four years, and until his successor is elected and qualified."

Title 17, Section 74, Code of Alabama 1940, provides:

"Circuit solicitors; when elected.—One circuit solicitor for each judicial circuit shall be elected on the first Tuesday after the first Monday in November, 1942, and every fourth year thereafter, and their terms shall be four years and until their successors are elected and qualified."

Title 41, Section 17, Code of Alabama 1940, provides:

"Terms of office of circuit solicitors.—Circuit solicitors shall hold office for the term of four years from the first Monday after the second Tuesday in January next after their election, and until their successors are elected and qualified."

In view of the above cited provisions, it is my opinion that you are entitled to hold office under your appointment until midnight of the first Monday after the second Tuesday in January, 1951, and until your successor is elected and qualified. Your term is concurrent with the other circuit solicitors of the State.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

February 24, 1948.

Hon. S. P. Rainer, Jr.,
Chairman, County Board of Education,
Bullock County,
Union Springs, Alabama.

Boards of Equalization—County Board of Education—Department of Revenue.

1. Under the provisions of Title 51, Section 89, Code of Alabama 1940, as amended by Act No. 350, General Acts 1943, page 333, the Commissioner of Revenue has authority to reject the first group of names submitted by any nominating body as provided in said section as nominees for membership on the county board of equalization.

2. When a group of names submitted by a nominating body is rejected by the Commissioner of Revenue as provided in Section 89, supra, as amended, the nominating body may submit one additional group of names different from those in the first group, one of which nominees shall, with the approval of the Governor, be appointed by the Commissioner of Revenue as a member of the county board of equalization.

Opinion by Assistant Attorney General Arbuthnot.

Dear Sir:

Your request for an official opinion bearing date of December 15, 1947, is as follows:

"Several weeks ago the Bullock County Board of Education nominated the following citizens of this county to the Bullock County Board of Tax Equalization: Mr. A. A. Adams of Midway, Mr. J. T. Bristow of Fitzpatrick, and Mr. C. W. Fenn of Union Springs.

"These three gentlemen have served for the past 8 years on this board. They are three of the best and most highly respected citizens of this county.

"Our Superintendent, Mr. R. J. Lawrence, was instructed by the board to mail these nominations to Mr. Phillip J. Hamm, State Revenue Commissioner. Mr. Lawrence filled out the blanks and sent the nominations to Mr. Hamm in accordance with instructions from the board. The vote on these three nominations was unanimous.

"Mr. Hamm wrote me a letter in which he stated he was rejecting these nominations and asked the board for three new nomi-

nations. The same three men were nominated again by a unanimous vote. Mr. Lawrence mailed these nominations to Mr. Hamm as instructed by the board.

"Since that time Mr. J. A. Tucker of Union Springs, who has no official capacity in Bullock County submitted a list of names which he stated would be satisfactory to him. He stated that no nominations which were sent in would be approved by Mr. Hamm without his (Tucker's) approval. He further stated that he would not approve anyone who did not vote for Folsom.

"The Bullock County Board of Education is not interested in how a man voted when making nominations for the Board of Tax Equalization. All we want are men who are qualified and have the respect and confidence of the people of Bullock County. We do not propose to let Mr. Tucker dictate to us as to whom we should nominate.

"We are, therefore, requesting a ruling from you in order that we may nominate in accordance with the law. We request a ruling on the following questions:

"1. Does the State Revenue Commissioner have a legal right to reject our nominations?

"2. How many times do we have to nominate three men in the event the State Revenue Commissioner rejects our nomination?

"Please let us hear from you at your earliest convenience."

In answer to your inquiry, your attention is called to Title 51, Section 89, Code of Alabama 1940, as amended by Act No. 350, General Acts 1943, page 333, which is in part as follows:

"Sec. 89—HOW MEMBERS SELECTED—During the month of August, 1943, and during the month of August of each fourth year thereafter, the court of county commissioners, or other governing body of each county, the county board of education, and the governing body of the largest municipality in each county, shall each submit in writing, to the State commissioner of revenue, the names of three persons, and the governing body of each other incorporated municipality within the county shall, in like manner, submit the name of one person all of whom are residents of the county, and who are each owners of taxable property which is located within this state, and who are each qualified electors in said county, and who are, in the opinion of said nominating body, persons competent to serve as members of the county board of equalization. In those counties where there is no incorporated municipality, the court of county commissioners or other governing body of said county shall nominate

six persons as competent persons for appointment to membership on such board of equalization. From each group of three nominees, submitted by the county governing bodies and the county board of education and from the total group of nominees submitted by the governing bodies of the municipalities, the commissioner of revenue, within thirty days after receipt of such lists of nominees, with the approval of the governor shall appoint one person to membership on the county board of equalization so that the membership of said board shall be composed of three members, one of whom was nominated by the governing body of the county, one by the county board of education, and one by the governing body of the incorporated municipalities in the county, except however, that in those counties having no incorporated municipality, two of the three members of said board shall be selected from the six nominees of the county governing body, provided, however, that the commissioner of revenue may reject any group of nominees, in which event the body nominating them shall submit additional names, one of whom shall be appointed by the commissioner of revenue with the approval of the governor. * * *." (Emphasis supplied.)

It will be seen from the above section that the State Commissioner of Revenue may reject any group of nominees, in which event the body nominating the group (in this case the County Board of Education of Bullock County) shall submit additional names, one of whom shall, with the approval of the Governor, be appointed by the Commissioner as a member of the county board of equalization. When the group submitted by a nominating body is rejected by the Commissioner, as provided in Section 89, as amended, *supra*, the additional names submitted by the nominating body shall be different from those submitted in the rejected group.

Answering your first inquiry, it is my opinion that the Commissioner of Revenue has authority under Section 89, as amended, *supra*, to reject the first group of names submitted by any nominating body as provided in said Act.

In answer to your second inquiry, it is my opinion that when a group of names submitted by a nominating body is rejected by the Commissioner of Revenue, the nominating body may submit only one additional group of names. Section 89, as amended, *supra*, specifically provides that when a group is rejected, the body nominating them shall submit additional names, and the Commissioner of Revenue, with the approval of the Governor, shall appoint one of the group as a member of the county board of equalization. The Commissioner has no authority to reject the additional group submitted. Therefore, the question of the submission of a third group could not arise.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

February 25, 1948.

Hon. H. W. Clayton, Judge,
Probate Office,
Marshall County,
Guntersville, Alabama.

Act No. 585, House Bill 982—Marshall County—Statutes—
Words and Phrases.

The language used in Act No. 585, House Bill 982, providing, "The governing body of Marshall County shall hold such referendum not less than sixty nor more than ninety days after the ratification of this amendment" is mandatory and such election must be held as provided in said Act.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

Your request for an official opinion, dated January 22, 1948, is as follows:

"The House of Representatives passed House Bill No. 982, by Mr. Benford, on September 18, 1947, and the Senate passed the bill on September 30, 1947, submitting a constitutional amendment therein provided for, as follows:

"The governing body of Marshall County, when authorized to do so by a majority of the qualified electors of the county voting in a referendum held in the manner prescribed by the county governing body, may levy and collect a county privilege license tax from any person engaged within the county in the business of selling or keeping in storage for sale gasoline, woco pep, or any other motor fuel used by self-propelled vehicles, which tax shall not be in excess of three cents per gallon on all gasoline, woco pep, or other motor fuel sold or stored, and the proceeds of which shall be used exclusively for construction and maintenance of hard surface farm-to-market roads in the county. The governing body of Marshall County shall hold such referendum not less than sixty nor more than ninety days after the ratification of this amendment; subsequent referenda may be held at intervals of not less than two years."

"This election was held, as you know, on January 6, 1948, and the amendment was adopted by a majority of the vote of the electors voting in the State in that election. The electors of Marshall County, however, voted the amendment down by a majority of some three to one. I am the Chairman of the governing body of Marshall County, and the governing body does not desire to call this election, unless required to do so by the last sentence in the amendment: 'The gov-

erning body of Marshall County shall hold such referendum not less than sixty nor more than ninety days after the ratification of this amendment; subsequent referenda may be held at intervals of not less than two years.'

"If the election is held it only means that Marshall County will be out all of the expense of the election, amounting to several hundred dollars, judging from the great majority voting against the adoption of this amendment. The governing body does not want to create this expense unless it is required to do so by the Constitution as amended by this amendment.

"Is it mandatory on the governing body of Marshall County to call and hold such referendum not less than sixty nor more than ninety days after the ratification of the amendment, which was January 6, 1948?

"Please give me your opinion by return mail."

My answer to your question is in the affirmative.

It is my opinion that the terms used in Act No. 585, House Bill 982, to the effect that "The governing body of Marshall County shall hold such referendum not less than sixty nor more than ninety days after the ratification of this amendment" is mandatory and the governing body of Marshall County must call and hold a referendum as provided in said Act not less than sixty nor more than ninety days after the ratification of this constitutional amendment.

The appellate courts of this State have for many years followed a more or less uniform rule in determining whether a provision in a statute is directory or mandatory. This uniform rule is well stated in the case of *McDonald v. State*, 28 So. 2d 805, as follows:

"In determining whether a provision in a statute is directory or mandatory, the prime object is to ascertain the legislative intention disclosed by the statute in relation to the subject dealt with and the purpose to be accomplished. Generally those provisions which do not relate to the essence of the things to be done, and as to which compliance is a matter of convenience rather than substance, are directory, while those which relate to the essence of the thing to be done are substantive, and mandatory. *Board of Education of Jefferson County et al. v. State ex rel. Kuchins*, 222 Ala. 70, 131 So. 239; *Ex parte State ex rel. King*, 233 Ala. 318, 171 So. 892."

It is to be noted from the above rule that provisions in a statute are to be taken as directory only when such provisions are resorted to as a matter of convenience. While on the other hand, it is to be likewise noted that when the provisions of a statute are essential to the thing to be accomplished, then such provisions are mandatory.

The very essence of the thing to be accomplished by Act No. 585, supra, is the levying and collecting of the privilege tax therein provided for, and the only way that the governing body of your county may levy this tax is by the authorization of a majority of the voters of your county voting in favor of this tax. Therefore, the calling of the election relates to the essence of thing to be done and is substantive and mandatory.

I realize that when this constitutional amendment was voted upon on January 6, 1948, it was defeated by a big majority in your county. However, under the rules of statutory construction I do not believe that I can look at the results of this election in arriving at the proper legal construction to be placed upon Act No. 585, supra.

I am, therefore, constrained to hold that the calling of this election is mandatory upon the governing body of your county and should be called within the time prescribed in said Act.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

February 25, 1948.

Hon. W. R. Stuart,
Judge of Probate,
Baldwin County,
Bay Minette, Alabama.

Poll Tax—National Guard—Exemptions.

Members of the National Guard exempt from payment of poll tax during period of active membership under Title 35, Section 11, Code of Alabama 1940.

Opinion by Assistant Attorney General Parker.

Dear Sir:

Your request for an official opinion bearing date of February 10, 1948, is as follows:

"Please let me know at your earliest convenience if a member of the National Guard is exempt from poll tax. Title 35 section 11 is a little confusing to me.

"Thanking you for your promptness, I am."

In reply to your question, I am of the opinion that under the provisions of Title 35, Section 11, Code of Alabama 1940, a member of the

National Guard is exempt from the payment of poll tax during his active membership in the National Guard.

Your attention is called to the following reports of the Attorney General on this subject: Biennial Report of Attorney General, 1928-30, page 1019. As to the time at which he must be an active member: See Quarterly Report of Attorney General, Vol. 19, page 67, and Quarterly Report of Attorney General, Vol. 27, page 338. As to the length of the exemption provided by the certificate of exemption as outlined in Title 35, Section 11, Code of Alabama 1940: See Biennial Report of Attorney General, 1934-36, page 573.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

February 25, 1948.

Honorable James E. Folsom,
Governor of Alabama,
CAPITOL.

Statutes and Acts—Building Commission.

1. Sections 365, 366, and 367, Title 55, Code of Alabama 1940, creating a (first) Building Commission and providing an appropriation, are not repealed and the authority of said Commission is set forth in Section 366.

2. Act No. 146, General Acts 1945, page 182, as amended by Act No. 646, General Acts 1947 (Ms.), denies to the Commissions created respectively by Section 365, Title 55, Code of Alabama 1940 and Act No. 128, General Acts 1945, page 116, the right to erect an office or administrative building, and places such authority and all its incidents in the Alabama Building Corporation, created by Act No. 146, as amended, supra.

Opinion by the Attorney General.

Dear Sir:

Your request for an official opinion, bearing date of December 3, 1947, is as follows:

"Reference is made to Title 55, Section 365-367, Code of Alabama 1940, and to Act No. 128, General Acts, 1945, Page 116, approved June 16, 1945.

"At a meeting of the Building Commission created by Title 55, Section 365, supra, held on May 5, 1947 a question arose as to

whether said commission still existed after passage of Act No. 128, which also created a building commission. The commission adopted a motion that I request your opinion on the matter.

"Accordingly, I request your official opinion as follows:

"1. Does the building commission created by Title 55, Section 365, supra, now have a legislative existence in view of Act No. 128, supra?

"2. If you hold that said commission does still have a legislative existence, is its authority as set forth in Title 55, Section 366, supra, limited in any way by Act No. 128, supra, or any other legislation enacted subsequent to the adoption of the Code of Alabama 1940, or is the appropriation made to it by Title 55, Section 367, supra, affected in any way by Act No. 128, supra, or any other legislation enacted subsequent to the adoption of the Code of Alabama 1940?"

The question which you present is whether or not Act No. 128, General Acts 1945, pages 116-145, or any subsequent law, repealed, in whole or in part, Sections 365-367, Title 55, Code of Alabama 1940. I deem it appropriate here to discuss the origin of the statutes and Acts under consideration, and to point out the conflicting provisions, if any, contained therein.

The origin of Title 55, Sections 365-367, of the present Code, is to be found in Act No. 369, General Acts 1911, page 12. The title of this Act was "to make appropriations for the extensions, enlargements, and improvements of the **State Capitol Building** and to furnish the same and to provide a Building Commission to have control and supervision thereof." The Act follows the title. This Act of 1911 was brought into the Code of Alabama 1923 as Sections 88-90 without material change. These Code sections were amended by Act No. 124, General Acts 1927, pages 85-86. This amendatory Act changed the personnel of the Commission by adding two citizens to the membership thereof, and also enlarged the area over which the Commission had jurisdiction. As thus amended, the statute is codified in Sections 365-367, Title 55, Code of Alabama 1940.

All the power vested in the Commission is clearly set forth in Section 366. This section reads as follows:

"§366. Meeting and powers of commission.—The said commission shall convene only upon the call of the governor. The said commission has full power and authority, for and in behalf of the State of Alabama, to contract for the extension, enlargement or improvement of the present capitol building and grounds and the governor's mansion and it shall also have full power and authority to provide for the improvement of blocks of property now owned or hereafter

acquired by the state adjacent to the block upon which the capitol is now situated by making a harmonious unit of the ground and tearing down the old building thereon and the construction thereon of appropriate administrative and judicial buildings and generally to take such steps as may be necessary in accomplishing this purpose. They shall, when they see fit, make recommendations to the legislature upon matters within the scope of this article. A part of the appropriation hereinafter made shall be used for the express purpose of providing for the supreme court and appellate court of the State of Alabama, the executive department, and the secretary of state; and a part of the appropriation hereinafter made shall also be used in refurnishing the halls of the senate and the house of representatives, and for fitting up suitable legislative committee rooms, and for the relief of the general congested condition of other departments of the state government. The said building commission may adopt all necessary rules, and regulations and plans for its own guidance and for the proper conduct of the duties herein imposed. It shall keep a regular journal of its proceedings and shall make recommendations and a detailed report of its entire work and operations, to each regular session of the legislature. The members of the said commission are to serve without compensation."

The Legislature in 1945 created a second Building Commission. The full powers and authority of this second Commission are set forth and determined in Act No. 128, General Acts 1945, page 116, approved June 16, 1945. The membership of the Commission shall consist of the Governor, State Health Officer, Director of Finance, State Superintendent of Education, four members of the Senate, to be elected by that body at each regular session of the Legislature, and four members of the Legislature, to be elected by that body at each regular session thereof. Provision is made for the filling of vacancies.

The authority, duties, and powers of this Commission are set forth and determined by Section 2 of the Act, reading as follows:

"Section 2. The commission shall have full power and authority for and on behalf of the State of Alabama to acquire lands by purchase, condemnation or otherwise; to plan buildings and designate the location thereof; to plan and provide for the improvement of all property now owned or hereafter acquired by the state or any institution or agency thereof; to construct, repair, equip, remodel, enlarge, renovate, furnish, refurnish, improve, and locate such buildings, structures and facilities for the use of the State of Alabama or any of its institutions or agencies as in its judgment shall be necessary for state, institutional, or agency purposes; to enter into contract to do any of the foregoing; to receive any monies, land or equipment donated, appropriated, or otherwise acquired by it for such purposes; and generally, to take such steps as may be necessary to accomplish such purposes. Said commission is authorized and empowered to use the services, facilities, or employees of the State Planning Board

in furthering the objects of this act when its request so to do is approved by the Governor. The commission may appoint and dismiss such officers, employees, and agents including competent architectural and technical employees as may be necessary to effectuate the purposes of this act. All employees of said commission shall be subject to the provisions of the Merit System. The commission is authorized to fix by contract the fees or compensation of all architectural and technical employees without regard to the Merit System Act. The commission is authorized and empowered to make and adopt all necessary rules, regulations and plans for its own guidance and for the proper conduct of the duties imposed upon it. Its decisions with respect to approval and allocations of funds shall be final. It is provided, however, that the commission is required hereby to give first consideration in its approval of projects and allocations of funds to projects classed as 'urgent' in the State Department of Finance Survey of Capital Improvement Program, dated May 23, 1945, which is Section 5 hereunder; but the commission is hereby empowered, upon a two-thirds approving vote of all its membership, to change the classification of any project included in the survey and to make additions thereto and deletions therefrom; and the commission shall not be bound, in its allocation of funds, to the costs fixed for projects in the survey. No meeting of the commission shall be held on less than three days actual notice to the members thereof."

The Capital Improvement Program mentioned in the aforequoted section is set forth in Section 4 of the Act. This Improvement Program contains a survey showing the needs of various State institutions and agencies, and appropriate projects are listed and classified as "urgent," "desirable," and "deferrable." Estimated costs of the several projects are likewise listed. There appears in said survey a "Capital Group." Projects listed under this group are, (1) State office building, (2) Archives and History bookstacks, and (3) laboratory building. This Section (4) creates and establishes a building commission fund to which appropriations are made. These appropriations are lump sum and not continuing.

The Legislature in 1947 created the Alabama Building Corporation. See Act No. 146, General Acts 1945, page 182, as amended by Act No. 646, General Acts 1947 (Ms.). The Corporation is composed by the Governor, the Director of Finance and the Attorney General, with power and authority, at a cost not to exceed \$2,750,000.00, to construct, operate and maintain, or cause to be constructed, operated and maintained, an office building, the space therein to be rented to any department, board, bureau, commission or agency of the State. The Act also provides a plan to finance construction with authority to the Corporation to borrow money and give security therefor. This Act was approved June 23, 1945, and the amendment thereto on October 9, 1947.

An examination of Act No. 128, General Acts 1945, page 116, creating a second Building Commission, discloses that it contains no provision

repealing any of the provisions of Sections 365-367, Title 55, Code of Alabama 1940, creating the first Building Commission, and likewise the Act creating the Alabama Building Corporation, to which reference has been made, contains no such repealing clause. If there is any repeal, it is by implication.

Our appellate courts have from time to time frowned upon repeal by implication. Decisions are numerous to the effect that doctrine of repeal by implication will not be resorted to except where the repugnance or opposition is too clear and plain to be reconciled. Nothing short of an irreconcilable conflict between two statutes works a repeal by implication. Where there is a reasonable field of operation by a just construction of both statutes, both will be given effect. Further, our courts have said that if the later act covers the entire subject-matter of the former act, and enacting provisions directly conflict with former, there is a repeal by implication. *Fidelity & Deposit Company of Maryland v. Farmers' Hardware Company*, 136 So. 824; *Ex Parte Jones*, 102 So. 234, 212 Ala. 259, reversing judgment *Jones v. Lee*, 102 So. 233, 20 Ala. App. 377; *Alabama Digest*, Vol. 18—Statutes—No. 158.

In determining the existence vel non of implied repeal, the objects of the two laws must be considered. *Abramson v. Hard*, 229 Ala. 2, 155 So. 590; *Union Bank & Trust Co. v. Blan*, 229 Ala. 180, 155 So. 612. These objects are determined from the wording and subject matter of the statutes.

In construing statutes, the decisions of Alabama have held that the courts must look to the context, the spirit and the whole of the statute, as well as to other statutes, to reach the true intent of the Legislature, as a thing may be within the letter of a statute and not within the spirit, or it may be within the spirit and not within the letter. *City of Birmingham v. Southern Express Co.*, 164 Ala. 529, 51 So. 159(3).

What is the object of Sections 365-367, Title 55, Code of Alabama 1940, and what is the letter and spirit of that statute?

The Legislature, no doubt, recognized that the Governor of the State would occupy the Capitol building as the Chief Executive of the State of Alabama, and that he would also occupy, during his term of office, the Governor's mansion. It also recognized that the Judicial Building would be of great importance to the Attorney General and to the Chief Justice of the Supreme Court. The present Capitol has been in existence for a number of years. A Governor's mansion has been built. Since the authority was granted to this Commission, a Judicial Building has been erected and is now occupied by the appellate courts and the Attorney General and his staff. The halls of the Senate and of the House have been refurnished; suitable legislative committee rooms have been provided; and other congested conditions in the Capitol building have been improved.

Therefore, it appears that the Building Commission has partly exercised its authority as provided in said Section 366, *supra*.

What are the authorizations and objects of Act No. 128, *supra*, creating the second Building Commission?

A reading of the first part of Section 2 of the Act gives to the Commission full control and power to "acquire lands by purchase, condemnation or otherwise; to plan buildings and designate the location thereof; to plan and provide for the improvement of all property now owned or hereafter acquired by the state or any institution or agency thereof; to construct, repair, equip, remodel, enlarge, renovate, furnish, refurnish, improve, and locate such buildings, structures and facilities for the use of the State of Alabama or any of its institutions or agencies as in its judgment shall be necessary for state, institutional, or agency purposes; to enter into contract to do any of the foregoing; to receive any monies, lands or equipment donated, appropriated, or otherwise acquired by it for such purposes; and generally, to take such steps as may be necessary to accomplish such purposes."

These authorizations, considered apart from the other provisions of the Act, are broad and comprehensive, and purport, standing alone and without context to the other portions of the Act, to give the Commission full control and power over all real properties of the State to the exclusion of any other Commission theretofore existing. They also purport to grant the Commission full power of acquisition.

But, these authorizations cannot be considered apart and distinct from other provisions of the Act. Other provisions of the same section of said Act provided "that the commission is required hereby to give first consideration in its approval of projects and allocations of funds to projects classed as 'urgent' in the State Department of Finance Survey of Capital Improvement Program, dated May 23, 1945, which is Section 5 hereunder; but the commission is hereby empowered, upon a two-thirds approving vote of all its membership, to change the classification of any project included in the survey and to make additions thereto and deletions therefrom; and the commission shall not be bound, in its allocation of funds, to the costs fixed for projects in the survey." The Capital Improvement Program is set forth in Section 4 of the Act. This Program lists a number of projects and extensive repairs and additions. Some of them, as we have already stated, are classed as "urgent," others "desirable," and several as "deferable."

We thus observe that the Legislature has clarified its broad and comprehensive authorizations and powers to the Commission by providing a list of projects which it considers as urgent, desirable, and deferable. It further provided that the Commission would have no power to change the classification, or to add or delete projects without a two-thirds approving vote of the Commission's membership. The effect of such quali-

fications is to confine the Commission to the classifications and projects listed, unless a two-thirds approving vote of the membership of the Commission should decide to change the same.

If it had been intended by the Legislature to give the Commission broad and comprehensive power and control in the matter of acquiring lands for the State and planning buildings and designating locations thereof, in planning and providing for improvement of all property owned or acquired by the State or any agency thereof, in the construction, repair, equipping, remodeling, enlarging, renovating, furnishing, refurnishing, improving and in locating such buildings, structures, and facilities for the State of Alabama, or any of its institutions or agencies, then a listing of projects and clarifying the same, as appear in the Capital Improvement Program set forth in the Act, would not have been necessary, for the reason that such power and authority had already been given. Specific reference is made to the fact that no projects can be added or deleted, or changes in classification made, without a two-thirds approving vote of the Commission. This requirement for an approving vote indicates a legislative intent to otherwise restrict the Commission to the projects listed. Such restriction limits the broad and comprehensive powers that may be accredited to the literal wording of the Act.

What was the intent and purpose of the Legislature in creating the Alabama Building Corporation with full power and authority to erect a State office building?

Such power and authority to erect a State office building was first given the Building Commission having existence pursuant to Section 365, Code of Alabama 1940. The second Building Commission, created by the Act of 1945, was also given authority to erect a State office building with an allocation therefor of \$1,950,000. The demands of the State at the time all of these authorizations were given did not require more than one new State office building. There is an apparent conflict among the several authorizations.

The last legislative expression on the subject was in Act No. 146, creating the Alabama Building Corporation. This Act was approved June 23, 1945. The approval was subsequent to the approval of the Act creating the second Building Commission. The effective date of an Act is governed by its approval. Therefore, the Act creating the Alabama Building Corporation, and authorizing it to erect an office building, became effective after the other Act creating the Building Commission. There being a direct conflict in the provisions of prior laws for the erection of an office building, it is my opinion and judgment that the last legislative expression on the subject, namely, authorization to the Alabama Building Corporation to erect an office building, prevails and authority is given to said Corporation to the exclusion of other prior authorizations.

The Alabama Building Corporation not only is given authority to construct and erect said office building, but it is given the power to operate and maintain the same. Such maintenance carries with it the exclusive right to improve and beautify the grounds.

It is further my opinion that the duties and jurisdiction of the first Building Commission, namely, the one created pursuant to Title 55, Section 366, Code of Alabama 1940, remain intact, except as to the construction of a new Governor's mansion and of an office or administrative building. It was not the intention and purpose of the Legislature, by the enactment of Act No. 128, General Acts 1945, page 116, creating a second Building Commission and defining its powers and duties, to encroach upon all the powers and duties of the first Building Commission. In support of this conclusion, we again refer to the fact that when this second Building Commission was created, the Judicial Building had been bought, and was occupied by appropriate departments; the Governor's mansion had been built and was occupied by the Governor; and the Capitol building was also in existence and being used. An annual appropriation of not more than \$100,000 for the erection, maintenance, repairs, improvements, and upkeep of said buildings was made.

Answering the questions which you have propounded, I conclude as follows:

1. That Sections 365, 366 and 367 of Title 55, Code of Alabama 1940, creating a Building Commission and providing an appropriation, have not been repealed; said Building Commission still has a legal existence; and the annual appropriation made to it by Section 367 is not affected by subsequent legislation.

2. That the functional boundaries of the two Building Commissions and the Alabama Building Corporation are as follows:

- (a) That the first Building Commission, having existence pursuant to Title 55, Sections 365-367, Code of Alabama 1940, at this time has the power and authority to repair, equip, heat, remodel, enlarge, renovate, furnish, refurnish and improve the Capitol building, the Governor's mansion, the Judicial Building, and the buildings located on blocks of property now owned or hereafter acquired by the State adjacent to the block upon which the Capitol is now situated, and also has the power and authority to beautify the grounds upon which said buildings are located.

It is also my opinion that the word "adjacent," as used in Section 366, supra, is broad enough to include the buildings occupied by the Department of Industrial Relations, the Department of Public Welfare and the State Board of Pardons and Paroles and the grounds upon which said buildings are located.

(b) That the second Building Commission, created pursuant to Act No. 128, General Acts 1945, page 116, has full power and authority over the projects listed under the Capital Improvement Program of Section 4 of said Act, with the right, upon a two-thirds approving vote of the membership of the Commission, to change the classifications of the projects, and also to add additional projects (listed or unlisted), including a new Governor's mansion, and to delete any of said projects.

(c) That the Alabama Building Corporation has the exclusive authority to construct, erect, operate, and maintain a State office building, or contract therefor, together with the incidents of such construction and maintenance, including the beautification of the grounds.

This opinion is substituted for the one released on January 16, 1948, to the Governor on the same subject. This substitution eliminates one word and rephrases one or two sentences that might be considered too restrictive in defining the functional boundaries of the commissions—restrictions not intended to be made. There are no material alterations of the essentials of the original opinion, but the changes herein made propose to avoid any misunderstanding as to its scope.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

February 25, 1948.

Hon. H. H. Kinney,
Judge of Probate,
Cullman County,
Cullman, Alabama.

Offices—Sheriffs—Vacancies.

In the event a vacancy occurs in the office of sheriff by reason of the resignation of the incumbent, the person appointed by the Governor to fill the vacancy holds office for the unexpired term and until his successor is elected and qualified.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

Your request for an official opinion bearing date of February 23, 1948, is as follows:

"The sheriff of Cullman County was appointed by the Governor to fill the vacancy created by the resignation of the elected sheriff

and the question has arisen as to whether the appointee is appointed for the unexpired term or only until the next general election.

"Will you please give me an official opinion upon the following question:

"When a vacancy occurs in the office of Sheriff, and an appointment is made by the Governor, is the appointee appointed for the remainder of the unexpired term?"

"Section 26, Article 5, Constitution of 1875 of the State of Alabama reads in part as follows:

"'Vacancies in the office of Sheriff shall be filled by the Governor, as in other cases; and the person appointed shall continue in office until the next general election in the county for sheriff, as provided by law.'

"Sec. 138, Article 5, Constitution of 1901 of the State of Alabama omits the provision contained in the corresponding section of the Constitution of 1875 as set out above relative to the filling of a vacancy.

"Section 176, Title 41, of the 1940 Code of Alabama reads as follows:

"'Vacancies in state and county offices; how filled; term of office. Vacancies in all state and county offices are filled by appointment of the Governor, except as otherwise provided; the appointees must be commissioned, and they shall hold their offices for the unexpired term, and until their successors are elected and qualified.'

"I will appreciate an immediate opinion since the qualifying date for candidates is rapidly approaching the last day."

Constitution of Alabama 1901, Section 138, was amended by a constitutional amendment which was proposed by Act No. 226, General Acts 1936-37, page 268, was voted upon by the qualified electors of the State on May 3, 1938, and was proclaimed ratified on May 11, 1938. Said section, as thus amended, provides in pertinent part, as follows:

"A sheriff shall be elected in each County by the qualified electors thereof who shall hold office for a term of four years unless sooner removed, and he shall be eligible to such office as his own successor. * * * *"

Title 17, Section 68, Code of Alabama 1940, provides in pertinent part, as follows:

"* * * a sheriff * * * shall be elected on the first Tuesday after the first Monday in November, 1942, and every fourth year thereafter.
* * * ."

Title 41, Section 18, Code of Alabama 1940, provides, as pertinent:

"The sheriff * * * shall hold their (his) respective office(s) for the term of four years from the first Monday after the second Tuesday of January next after this (his) election, and until their (his) successor(s) are (is) elected and qualified."

Title 41, Section 176, Code of Alabama 1940, is set forth in your request for opinion.

Title 41, Section 177, Code of Alabama 1940, is to the same effect as is Title 41, Section 176, *supra*.

It appears that Title 41, Section 176, *supra*, is applicable to the filling of a vacancy in the office of sheriff. I find nothing in the constitution or statutes of this State otherwise providing for the filling of such a vacancy.

It follows, therefore, that a person appointed by the Governor to fill a vacancy in the office of sheriff, created by the resignation of the incumbent, holds office, by virtue of such appointment, for the unexpired term and until his successor is elected and qualified.

Authority for this conclusion is found in the opinion of the court in the case of *Dowling v. White*, 116 Ala. 306, 23 So. 133. While the decision in that case turned on a constitutional provision then in effect which is no longer applicable, the court had occasion to consider Section 248, Code of Alabama 1886, which was identical with Title 41, Section 176, *supra*, and commented to the effect that, if that statute had then been applicable to the office of sheriff, a person appointed to fill a vacancy in such office would hold office, by virtue of such appointment, for the unexpired term.

I have hereinabove set out the statutes dealing with the time for the election of sheriffs and the term of office of sheriffs.

Applying the above holding to the instant situation in Cullman County, I advise that Hon. Shelly D. Hyatt, who was appointed by the Governor on January 21, 1947, as Sheriff of Cullman County, to fill the vacancy in said office caused by the resignation on that date of Hon. J. D. Mitchell, who had been elected in the general election in November, 1946, and had qualified and assumed the duties of the office, is entitled to hold the office of Sheriff of Cullman County, by virtue of said appointment, until midnight of the first Monday after the second Tuesday in January, 1951, and until his successor is elected and qualified.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

February 25, 1948.

Honorable H. M. Brittain,
Judge of Probate,
Randolph County,
Wedowee, Alabama.

Veterans—Exemptions—Poll Tax.

One serving as a member of the Regular Army Reserve during a period of time within the time limits specified in Amendment XLIX to the Constitution of Alabama 1901 amending Section 194½ thereof, is not exempt from the payment of poll tax. Such service is not service in the Army of the United States within the purview of said amendment.

Opinion by Assistant Attorney General Screws.

Dear Sir:

Your request for an official opinion, bearing date of February 20, 1948, is as follows:

"Dorsey Charlie Yarbrough, a bona fide resident citizen of the City of Roanoke, County of Randolph, State of Alabama, who has registered in said County, wishes for me to issue to him a certificate of exemption as being exempt from the payment of poll tax by reason of Amendment to Section 194½ of the Constitution of Alabama.

"I am attaching hereto copies of an Honorable Discharge he received from United States Army on the 17th day of May, 1939, and another one wherein he enlisted on the same date and obtained an Honorable Discharge from the Regular Army Reserve dated the 7th day of February, 1941. The discharges are true copies.

"I will deeply appreciate it if you would answer this letter quickly and advise me whether or not I should issue a certificate of exemption to Dorsey Charlie Yarbrough that will exempt him from the payment of poll tax by reason of the section above given. There may be some rules and regulation that have been prescribed by the Government that have not come to my knowledge."

I am of the opinion that your inquiry is answered in the negative.

Amendment XLIX to the Constitution of Alabama 1901, amending Section 194½ of said Constitution, proclaimed ratified November 17, 1944, provides as follows:

"Section 194½. No person who honorably served in the military service of the United States between January 1, 1917 and November 11, 1918, or between September 16, 1940 and December 8, 1941, or

at any time, past or present or future, when the United States was, is or shall be at war with any foreign state, shall be required after the beginning of such service to pay the poll tax specified in the Constitution of Alabama as a prerequisite to the privilege of voting in Alabama; but, on the contrary, every such person shall be exempt from the payment of all poll taxes which have theretofore accrued and have not been paid or which may thereafter accrue; Provided, however, that if any such person is discharged dishonorably from said service the exemption herein provided is forfeited, and such dishonorably discharged person, as a prerequisite to the privilege of voting in Alabama thereafter, must pay the poll tax specified in the Constitution of Alabama as if such person had never been in such service. The term 'military service' as used in this section includes service in the Army of the United States, the United States Navy, the Marine Corps, the Coast Guard, the Women's Army Auxiliary Corps, the Women's Appointed Volunteer Emergency Service, and the Women's Reserve of the United States Navy. The United States shall not be deemed at war with a foreign state within the meaning of this section at a time when an armistice exists between the United States and the foreign state. The Judge of Probate shall issue a certificate of exemption to a person exempt from the payment of poll tax by reason of this section under such rules and regulations as may be prescribed by the Governor. This section shall be self-executing and retroactive; but the Legislature is authorized to enact laws designed to carry out the purposes of this section." (Emphasis supplied.)

It will be noted that the "military service," as defined therein, must have been between the dates specified therein, or at any time when the United States Government is engaged in war with a foreign sovereignty. It does not exempt from payment of poll tax persons whose service began and ended when the United States was at peace with all sovereignties, other than between the date specifically enumerated.—See Quarterly Report of Attorney General, Volume 37, page 82.

The first discharge enclosed in your letter shows an honorable discharge from the Army of the United States as of May 17, 1939 from an enlistment begun November 9, 1938, and also shows prior service from November 3, 1935 to November 8, 1938. It is apparent that this discharge does not entitle the party in question to an exemption under the above quoted constitutional amendment, as his service, as shown thereon, is not within any of the dates specified in said amendment.

The second discharge shows an honorable discharge from the Regular Army Reserve as of the 7th day of February, 1941 from an enlistment begun May 17, 1939, together with a statement of prior service in conformity with the first discharge. The second discharge shows service within the dates specified in the above quoted constitutional amendment, viz: between September 16, 1940 and December 8, 1941. The question presents itself as to whether or not service in the Regular Army Reserve is within the purview of the term "military service," as defined in the

constitutional amendment under consideration. The term "military service," as used in said amendment, includes "service in the Army of the United States." Is service in the Regular Army Reserve service in the Army of the United States? I am of the opinion that this query should be answered in the negative. The amendment, in my judgment, contemplated active duty service and not merely service in a reserve component of the Army. This office has heretofore held that Reserve Officers of the United States Army are not exempt from payment of poll tax.—Quarterly Report of Attorney General, Volume 18, page 36; see also Quarterly Report of the Attorney General, Volume 20, page 97.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

March 3, 1948.

Hon. E. D. Banks,
Mayor, City of Anniston,
Calhoun County,
Anniston, Alabama.

Elections—Constitutional Amendment No. 5.

Under the provisions of Amendment No. 5, Constitution of Alabama 1901, ratified on January 6, 1948, the Legislature has fixed the day upon which the election therein provided for is to be held and it is mandatory upon the City Governing Body of Anniston to call, hold and conduct such election as provided by law for calling, holding and conducting district school elections.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

Your request for an official opinion bearing date of February 4, 1948, is as follows:

"Kindly advise me whether or not the governing body of the City of Anniston should call and give notice of the special election provided for in the Constitutional Amendment No. 5 which recently became effective. I enclose herewith a copy of said Amendment for your information.

"I shall greatly appreciate an early reply to this inquiry."

My answer to your inquiry is in the affirmative.

Constitutional Amendment No. 5, adopted by the qualified electors of the State of Alabama on January 6, 1948, in no uncertain terms pro-

vides that a special election is called to be held on the first Tuesday after sixty days following the date this amendment becomes effective for the purpose of allowing the qualified voters of the City of Anniston and other cities in Calhoun County to vote on the question as to whether or not a special school tax shall be levied and collected in the cities set out in the amendment. It appears from the express wording of this amendment that the Legislature and the qualified electors of the State of Alabama have specified a day certain upon which this election is to be held.

The last paragraph of said constitutional amendment reads, in part, as follows:

"Except as herein otherwise provided the elections hereinabove provided for shall be called, held, and conducted as provided by law for calling, holding, and conducting of district school tax elections. The governing bodies of the Cities of Jacksonville, Piedmont and Anniston shall appoint and designate the officers, managers, clerks, and returning officers and shall call, canvass, tabulate, and declare the result of the elections provided for in the Cities of Jacksonville, Piedmont and Anniston and in the school districts in which the Cities of Jacksonville, Piedmont and Anniston are located. * * * * *

The express duty is placed upon the city governing body of Anniston, Alabama, by the above quoted excerpt to call this election and to conduct said election in all regards as provided by law for the holding and conducting of district school tax elections. The only duty or authority which the governing body of the City of Anniston does not have in this regard, is fixing the day upon which this election is to be held. As hereinabove pointed out, this has already been done by the very wording of the amendment itself.

It might be contended that since the Legislature and the qualified voters of the State of Alabama have fixed the time for holding this election, that there is no duty or authority for the city governing body to act in the premises. In my opinion, there is no merit in this contention. In this regard, your attention is directed to the case of **Board of Education of Jefferson County v. State**, 222 Ala. 70, 131 So. 239, wherein it is provided as follows:

"(12, 13) In *Alabama Pine Co. v. Merchants' & Farmers' bank of Aliceville*, 215 Ala. 66, 67, 109 So. 358, 359, correct observation is made that:

"There is no universal rule by which directory provisions in a statute may, in all circumstances, be distinguished from those which are mandatory. In the determination of this question, as of every other question of statutory construction, the prime object is to ascertain the legislative intention as disclosed by all the terms and provisions of the act in relation to the subject of legislation and the general object intended to be accomplished.

"(14) 'Generally speaking, those provisions which do not relate the essence of the thing to be done and as to which compliance is a matter of convenience rather than substance are directory, while the provisions which relate to the essence of the thing to be done; that is, to matters of substance, are mandatory.' 25 R. C. L. 767, § 14."

The very thing to be accomplished by the enactment and adoption of this constitutional amendment is the levying and collecting of the special school tax after it has been authorized by the qualified electors within the corporate limits of the City of Anniston. It was undoubtedly the Legislature's intent in submitting this constitutional amendment to the vote of the people, that if it be adopted, then the election as therein provided must be held. The very essence of the thing to be done under the provisions of this constitutional amendment is the levying of this special school tax. The tax cannot be levied unless an election be held by the qualified voters of the City of Anniston, therefore, it necessarily follows that the election itself is of the essence of the thing to be accomplished and it is mandatory upon the city governing body of the City of Anniston to hold and call this election as therein provided.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

March 3, 1948.

Hon. H. E. Randall, Judge,
County Court,
Russell County,
Phenix City, Alabama.

County Court—Judge's Salary Increase—Act No. 500, Local Acts 1947 (Ms.), approved September 30, 1947.

1. The legislative act increasing the salary of the incumbent judge of the County Court of Russell County, Alabama to \$2400.00 per year became effective as of October 1, 1947, payable at \$200.00 per month.

Opinion by Assistant Attorney General Brooks.

Dear Sir:

Your request for an official opinion, bearing date of October 20, 1947, is as follows:

"I am writing you in regard to an opinion in regard to the salary of the Judge of the County Court of Russell County. At the time the Court was created the salary was \$1500.00 per year, or \$125.00 per month. At the last session of the legislature a local bill was passed changing only the salary in said court, being signed

by the Governor and to become effective October 1st, \$2400.00 per year.

"There is set up a County Court fund and I write my own checks. I wish to be advised if the salary becomes effective as of October 1, 1947, at \$2,400.00 per year or \$200.00 per month."

In answer to your inquiry, the salary of the judge of the county court becomes effective as of October 1, 1947. Section 11 of Act No. 39 (Local Acts 1936-37), Special Session, page 22, approved February 1, 1937, as amended by Act No. 500, Local Acts 1947, approved September 30, 1947, provides:

"* * * * * That the salary of the Judge of the County Court of Russell County shall be \$2,400.00 per annum payable in twelve equal monthly installments, * * * * *."

Section 3 of the amending Act states:

"This act shall take effect immediately upon its passage and approval by the Governor."

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

March 3, 1948.

Mr. J. L. Thompson, Chairman,
DeKalb County Board of Revenue,
Fort Payne, Alabama.

Prisoners—Hospitalization—Counties.

1. On a claim for medical attention for a prisoner wounded while resisting arrest, it is not necessary that he be confined in jail prior to hospitalization, to validate payment by county.

2. Claim for medical attention for a prisoner wounded while resisting arrest is a charge against the county, providing prisoner is insolvent. Title 45, Section 125, Code of Alabama 1940.

3. Opinion modified—Biennial Report of Attorney General, 1926-28, page 644.

Opinion by Assistant Attorney General Parker.

Dear Sir:

Your request for an official opinion bearing date of January 27, 1948, is as follows:

"Three claims have been filed against DeKalb County as follows:

"Dr. R. D. Clark, Gadsden, Alabama, for operation and treatment, D. F. Wilbanks, and assistant's fee, August 20-26, 1947	\$250.00
"Hoyt Wilson, Fort Payne, Alabama, for ambulance service from Fort Payne to Gadsden, D. F. Wilbanks, August 20, 1947, and from Gadsden to Fort Payne, August 27, 1947	28.00
"Baptist Memorial Hospital, Gadsden, Alabama, room, board, X-Rays, etc., D. F. Wilbanks, balance	109.75

"All of the foregoing claims arise from an occurrence on August 20, 1947, when D. F. Wilbanks was shot by the Sheriff of DeKalb County, Alabama, at or near Sylvania, about 12 miles from Fort Payne, Alabama. D. F. Wilbanks was suspected of transporting prohibited liquors, and it appears that after his car was stopped by the Sheriff, he attempted to escape, and was shot. He was taken by the Sheriff direct to the Baptist Memorial Hospital, Gadsden, Alabama, and was not placed in DeKalb County jail as a prisoner. The Circuit Court Judge made an order August 20, 1947, authorizing the Sheriff to remove D. F. Wilbanks to the hospital under the provisions of Section 129, Title 45, Code 1940, copy of this order is attached.

"Inasmuch as this prisoner was not confined in the jail of this county when taken to the hospital for treatment and in view of the opinion heretofore rendered by the Attorney General, Reports 1926-28, page 646, are these claims legal charges against DeKalb County and should they be ordered paid by the County Treasurer?"

In reply to your inquiry, I quote from Biennial Report of Attorney General, 1930-32, page 3 (Section 4808, Code of Alabama 1923, is now Title 45, Section 125, Code of Alabama 1940), as follows:

"Under the provisions of Section 4808 of the Code, supra, the sheriff is required to furnish to those prisoners who are sick and unable to provide for themselves the necessary medicine and medical attention at the expense of the county. This man although in the hospital is as much a prisoner of the sheriff as he would be if he were actually confined in the jail. The County is liable for the expense of medicine and medical attention furnished him by the sheriff after his arrest in the hospital. He has been in the legal custody of the sheriff since his arrest and has been his prisoner. * * * * * It is not necessary that the sheriff actually confine the prisoner in jail and subsequently take him to a hospital in order to render the county liable for this expense. It is a legal maxim that the law does not require the doing of a useless thing and this maxim is especially applicable in the instant case. The hospital is the proper place for this prisoner and if he is unable to provide for

himself the sheriff is authorized to bind the county to pay for medicine and medical attention.

"Report of Attorney General, 1920-22, p. 364, * * * * *

"Malone vs. Escambia County, 116 Ala. 218."

Your attention is also called to Biennial Report of Attorney General, 1920-22, page 463, where the facts presented were almost identical to those in the present case and the liability of the county was clearly indicated. See also Quarterly Report of Attorney General, Vol. 3, page 189.

For the procedural requirement and the conditions under which the county is authorized to pay the medical expenses and hospitalization expenses for prisoners see Quarterly Report of Attorney General, Vol. 43, page 58.

Under opinions of this office, the field of operation of Title 45, Section 125, supra, has been limited to those cases where the prisoner is unable to provide such treatment for himself. Quarterly Report of Attorney General, Vol. 21, page 110.

The opinion of the Attorney General referred to in your letter of inquiry (Biennial Report of Attorney General, 1926-28, page 644) is modified to conform to the holding of this opinion.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

March 4, 1948.

Hon. Charles Edgar Young,
Clerk of Circuit Court,
Lauderdale County,
Florence, Alabama.

Sheriffs—Commissions—

Sheriff is entitled to a commission on the purchase price at a sale under execution on a money judgment.

Opinion by Assistant Attorney General Kohn.

Dear Sir:

Your request for an official opinion, bearing date of February 3, 1948, is as follows:

"Will you please at your earliest convenience advise me on the following matter:

"On the following sale of land by order of court, on what amount is the Sheriff entitled to his commission? There is some question by the attorneys involved in the case as to whether the Sheriff is entitled to a commission on \$3000.50 or \$1000.50.

"

ORDER OF SALE

STATE OF ALABAMA }
LAUDERDALE COUNTY } IN THE CIRCUIT COURT

VIRGINIA-CAROLINA CHEMICAL CORPORATION,
A CORPORATION

Plaintiff

No. 10403 vs.

H. E. BELEW,

Defendant

TO THE SHERIFF OF THE SAID COUNTY:

Youe are hereby commanded to sell those tracts or lots of land of H. E. Belew, described as follows, to-wit:

Beginning 14 rods East of a point on Section line dividing Section 15 and 16 in Township One Range Eight West, the said point being the southwest corner of Wheeler's lot and Forty three rods and eleven links south of the graveyard at Lexington, Alabama, and about the point where the Springfield Bellview Road intersects the Rogersville and Lexington Road, thence East 16 rods, thence North forty degrees West 19 rods, thence West 6 rods, thence South 14 rods to beginning, containing one acre more or less,

which you have taken pursuant to our command, and which according to your return, remains in your hands unsold, to satisfy Virginia-Carolina Chemical Corporation the sum of \$737.30, the balance of a judgment recovered by it of the said H. E. Belew from the Circuit Court held for Lauderdale County on January 15, 1947, subject, however, to this condition that the contestant, Mrs. Clara Belew, is entitled to a homestead exemption in said property or share of the proceeds of sale of said property; that said property be advertised for sale by the Sheriff as provided by law; that at said sale if the Contestant, Mrs. Clara Belew, is purchaser she shall be entitled to \$2000.00, credit on her purchase price and the remainder of the sale price above \$2000.00 shall be applied to the payment of the costs of Court and the unpaid remainder of the judgment. But if some person other than the Contestant, Mrs. Clara Belew, purchases the property at said sale, the Sheriff is authorized and is directed with the proceeds of said sale to pay first to the Contestant, Mrs. Clara Belew, the sum of \$2000.00, in lieu of her homestead exemption and the

balance of the sale price shall be applied to payment of Court costs and the unpaid balance of the judgment.

Witness my hand this the 10th day of December, 1947.

/s/ Chas. Edgar Young
Circuit Court Clerk

Sheriff's Return:

Executed this 5th day of January, 1948, by selling the property herein described for \$3000.50 and sending Mrs. Clara Belew a check in the amount of \$2000.00 as per court order.

/s/ J. L. Potts
Sheriff ' "

It is my opinion that the sheriff is entitled to a commission on the \$3000.50 which was the purchase price at the sale.

Title 11, Section 35, Code of Alabama 1940, provides as follows:

"§ 35. Sheriff's fees, when due.—Sheriffs and coroners are not entitled to full commissions until after actual levy of execution on property of the defendant, and the money made or paid to the plaintiff in execution and then only on the amount actually collected or paid."

Title 11, Section 34, Code of Alabama 1940, provides, in part, as follows:

"§ 34. Fees allowed to sheriffs.—* * * * * Collecting money under execution: For the first two hundred dollars, five percent; for collecting all sums over two hundred dollars, up to and including five hundred dollars, four percent; and for collecting all sums in excess of five hundred dollars, three percent; but no commission shall be collected on costs. * * * * *"

The fact that the sheriff paid \$2000.00 of the purchase price over to the contestant, Mrs. Belew, does not in any way affect his commission. See Quarterly Report of Attorney General, Vol. 23(page 250, in which this office held that the sheriff was entitled to his commission on the purchase price at the sale, although there was no money paid over to the plaintiff, as the plaintiff was the judgment creditor who credited the amount of the sale on the judgment.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

March 5, 1948.

Hon. W. H. Drinkard,
Director of Finance,
State of Alabama,
CAPITOL.

*How apt not
12, 1948 511.*

State—Department of Finance—Personal Property.

Title 55, Sections 103, 104, 108 and 145, Code of Alabama
1940.

1. The funds derived from the sale of personal property of the State, which property was originally purchased from funds appropriated to one of the several departments of the State government, should be covered into the treasury of the State to the credit of the fund or department from whose funds said property was originally purchased.

2. Funds derived from the sale of personal property purchased out of the appropriation to the Department of Finance for office furniture and equipment for the executive, administrative and judicial departments, which fund is known as the Equipment Purchase Fund, should be covered into the treasury of the State to the credit of said Equipment Purchase Fund.

Opinion by Assistant Attorney General Hardin.

Dear Sir:

Your request for an official opinion, bearing date of February 12, 1948, is as follows:

"The question of what to do with funds derived from the sale of State owned personal property has long been a matter that varies with the needs. Some departments, chiefly the Department of Public Safety, has had the benefit of the proceeds of the sale of the Highway Patrol cars for a number of years because they have claimed that they could not operate out of their annual appropriation if the money went back into the general fund. In other instances where sales have been made of departmental property, the money has gone into the general fund.

"In my opinion the provisions of Title 55, Section 103, are not intended to, nor do they apply to funds received from the sale of personal property. However, this is the statute that has been used when the funds have been certified into the general fund.

"I believe the best course to pursue in this matter is for you to grant us an official ruling on the following question:

"1. What disposition should be made of any monies derived from the sale of State owned personal property which has been

declared surplus, obsolete or unuseable by any State department where said property was purchased out of funds appropriated to that department by the Legislature?

"At the present time there are many requests from the various departments for the Purchasing Department to buy new personal property where such has been declared surplus, obsolete or unuseable.

"As I am requesting an official opinion on the above, I believe it would be wise to make the following inquiry:

"2. What disposition should be made of funds derived from the sale of personal property which was purchased out of the appropriation to the Department of Finance for office furniture and equipment for the executive, administrative and judicial departments —\$15,000 by the 1947 Legislature which fund is known as Equipment Purchase Fund?

"The Legislature appropriated \$15,000 to the Department of Finance for the purchase of equipment. This money is used to assist the several State Departments whose budgets are not sufficient to buy minor pieces of equipment, such as furniture and the like. We have also used this money to buy automobiles for certain State officials from time to time, and we have found that in taking the proceeds from the sale of automobiles and certifying this money into the Equipment Purchase account, and buying a new car from this fund, the net cost to the State for the new car is very little or nothing.

"The above procedure has always been followed in the past, and we are requesting an official opinion in the matter."

Proper determination of those questions presented by your inquiry involves consideration of certain of the statutes found within the codified laws of the State. Your inquiry concerns only the proceeds derived from the sale of personal property, hence will be so restricted.

The acquisition of such property is governed by the provisions of Title 55, Section 108, Code of Alabama 1940. This statute provides that it shall be the duty of the Division of Purchases and Stores, which division is headed by an officer known as the Purchasing Agent, to purchase all personal property, except alcoholic beverages, for the State, and for each department, board, bureau, commission, agency, office and institution thereof. This division is further charged, under the terms of Section 108, supra, with the duty of making and supervising the execution of all contracts and leases for the use and acquisition of personal property, and the distribution thereof.

Under the authority of Title 55, Section 145, Code of Alabama 1940, there is created within the Department of Finance a division known as

the Division of Service, headed by an officer known as the Chief of Service. It is further provided within this statute that, among the other enumerated duties and authority of the division, is the authority to sell, exchange or otherwise dispose of any personal property of the State determined by the Director of Finance not to be needed for public use or to have become unsuited for such use. No mention is made as to the disposition of the proceeds derived from such sale.

I am in agreement with you as to the inapplicability of Title 55, Section 103, Code of Alabama 1940, to funds so derived from the sale of personal property originally purchased from appropriations made to the various departments of the State government for the operation of such departments. This statute, referring to departmental and institutional receipts, provides, in part, as follows:

"All fees, receipts, and income collected or received by any department, board, bureau, commission, agency, or office or institution of the state shall be paid into the state treasury or deposited in an approved state depository to the credit of the general fund of the State of Alabama or to the credit of a special fund if the latter is required by law. * * * *"

In my opinion, the above mentioned "fees," "receipts," and "income" do not include, nor bear any relation to, the proceeds derived from the sale of personal property of the State, which property was originally purchased from the appropriations made to departments of the State government for the operation of such departments.

Such proceeds could in no way be deemed a "fee." Neither do such proceeds, in my opinion, constitute a "receipt" or "income" within the meaning of this statute. "Income," in its popular signification, is the return in money which one receives from an investment of capital, as distinguished from capital itself, that is, net profit or net gain.—20 Words and Phrases (Per. Ed.) Income, page 499. In Webster's New International Dictionary, Second Edition, page 1258, the word "income" is defined as something that comes in as an addition or increment, and it is stated that a synonym of the word "income" is the word "receipt." Certainly it cannot be said that the proceeds here under consideration represent a net profit or net gain realized from an investment of capital, it never having been contemplated that the money from which the property sold was originally purchased was to be utilized for investment purposes, but rather that such money was to be expended in defraying the current operating expenses of the department to which appropriated.

It is, therefore, my opinion that rather than representing "income" or "receipts" within the meaning above set out, such proceeds represent capital itself as realized from the liquidation of personal property assets of the department originally purchasing such property. It is likewise of interest to note that throughout Section 103, supra, the framers thereof make every effort to distinguish between the "fees," "receipts," and "income" therein referred to and the annual appropriations made to the

various departments of the State government. Such being the case, it is my opinion, that proceeds derived from the sale of personal property should be covered into the treasury of the State, not necessarily to the credit of the general fund, but to the credit of the department from whose funds the original purchases were made. If within the appropriation to said department there are certain funds earmarked for designated purposes, said proceeds should be credited to the specific fund within the appropriation from which the original purchases were made.

To hold otherwise, would in effect write into the statutes of the State a second reversionary clause as regards those appropriations made by the Legislature to the various departments of the State government for the payment of current operating expenses. Title 55, Section 104, Code of Alabama 1940, provides that all unencumbered balances of all appropriations shall revert to the State treasury at the end of each fiscal year, and to the credit of the general fund or the special fund from which the appropriation or appropriations were made. Under this provision, it is apparent that any portion of an appropriation made to any department remaining at the end of the fiscal year reverts to the fund from which such appropriation was made. To say that, in addition to this reversionary provision, any proceeds derived from the sale of personal property of the State originally purchased from funds appropriated to any of the various departments of the State government for current operating expenses should also revert to the general fund of the State could occasion disastrous results.

Our statutes recognize the fact that the personal property of the various departments from time to time becomes obsolete, unsuitable, or unfit for the use intended. In such case, new additions must be made to the personal property of the department concerned. If, upon each occasion, the funds derived from the sale of the obsolete, unsuited, or unfit property were to revert to the general fund of the State, it is easily foreseeable that in time the personal property assets of the various departments could become entirely depleted and, this money having reverted to the general fund, such departments would be left without means of securing the necessary equipment. This is true in view of the fact that the Legislature in making the annual appropriations to each of the departments of the State government undoubtedly, as reasonable men must, take into account the fact that each department has on hand certain personal property or equipment, hence such appropriation is primarily directed to affording funds for the current operating expenses of the department, providing only for such new additions as might be needed from time to time. The Legislature certainly does not contemplate that from the appropriation made for each fiscal year the departments be required to completely refurnish and re-equip said departments. Therefore, if, as such property deteriorated or otherwise became unsuitable, the proceeds derived from the sale thereof reverted to the general fund, the department concerned would be left without funds to maintain the department and eventually all the personal property assets of the various departments, represented by their liquidated money value, would rest in the State treasury to the credit of the general fund. In my judgment,

the Legislature had no intention that such a situation should ever arise and that, therefore, the provisions of Section 103, *supra*, are inapplicable to the proceeds here considered.

Section 103, *supra*, being inapplicable, there is no statute governing the disposition of such proceeds. In such a situation, one must look to the intention of the Legislature as expressed in all relevant legislation and also to the administrative construction that such statutes have received over the years.

It is my opinion that, construing, as one may in such a case, the pertinent statutes, it is revealed that it is the intention of the Legislature that the annual appropriations made to the various departments of the State government be utilized primarily for the payment of current operating expenses, with such minor additions in the way of personal property as may become necessary, and that any funds derived from the sale of personal property of the various departments, which property was originally purchased from an appropriation made to such department, should revert to the credit of the fund from which originally purchased or to the credit of the department from whose appropriation originally purchased, and may be used in the securing of replacement property.

In your request, you inform me that such has been the custom and procedure followed for a number of years. The decisions of our courts are to the effect that the administrative construction of the laws by agencies created by law to administer them is to be given much weight, especially when long continued.—*First National Bank v. Basham*, 238 Ala. 500, 191 So. 873; and in the case of *State ex rel Fowler v. Stone*, 237 Ala. 78, 185 So. 404, it was held by the Supreme Court of Alabama that when there is doubt about the proper construction of a statute or constitutional provision, contemporaneous construction placed thereon by the courts, by officers whose duty it was to construe them, and by the executive departments, and the popular interpretation as exemplified in practice for a number of years, should be looked to in reaching conclusion as to the proper construction to be given such statute. Many of the decisions of our courts testify to the correctness of the above rule of law.

In view of all the above it is my judgment and opinion that the proceeds derived from the sale of personal property of the State should revert to the treasury of the State to the credit of the fund from which originally purchased or to the credit of the department from whose funds the original purchase was made. If any of such proceeds remain in said fund at the end of any fiscal year, of course, such amount reverts to the treasury of the State to the credit of the general fund or the special fund from which the appropriation was made.

Like reasoning should be applied to your second inquiry and a similar conclusion should be reached. It is my judgment that any proceeds derived from the sale of personal property which was originally purchased out of the appropriation to the Department of Finance for

office furniture and equipment for the executive, administrative and judicial departments of the State government, known as the Equipment Purchase Fund, should revert to the State treasury to the credit of said Equipment Purchase Fund. As above stated, any residue of said appropriation remaining at the end of any fiscal year reverts to the treasury to the credit of the general fund.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

March 5, 1948.

Hon. Rhett G. Owens,
Sheriff, Clay County,
Ashland, Alabama.

Sheriffs—Department of Corrections and Institutions—State
Comptroller—Costs and Fees—Prisoners—Escapes.

1. The statute prohibiting payment by State of feed bill or allowance to sheriff on account of prisoner who has escaped is applicable only so long as such prisoner remains at large Title 11, Section 102, Code of Alabama 1940.

2. The sheriff is entitled to claim his feed bill and allowance from the State in respect to an escaped prisoner, provided said prisoner is recaptured. Title 11, Section 102, Code of Alabama 1940; Title 45, Section 144, Code of Alabama 1940, as amended by Act No. 309, General Acts 1945, page 502.

3. A sheriff is not entitled to claim or collect his feed bill or allowance from the State in respect to an escaped prisoner, so long as the prisoner remains at large. Title 11, Section 102, Code of Alabama 1940; Title 45, Section 144, Code of Alabama 1940, as amended by Act No. 309, General Acts 1945, page 502; Title 45, Section 145, Code of Alabama 1940.

4. Opinions overruled, modified. Quarterly Report of Attorney General, Vol. 43, page 45; Vol. 2, page 291; Biennial Report of Attorney General, 1936-38, page 138.

Opinion by Assistant Attorney General Sykes.

Dear Sir:

Your request for an official opinion bearing date of February 12, 1948, is as follows:

"As sheriff of Clay County, I am requesting your official opinion on the following matter:

"On January 25, 1948, I had in my custody in the county jail in Clay County five prisoners. On that day, due to the condition of the jail, said prisoners escaped but were recaptured on the same day.

"On presenting a feed bill, including the allowance to the sheriff for keeping prisoners, under the provisions of Title 45, Section 147, Code of Alabama 1940, the State of Alabama refused to pay the feed bill and allowance to the sheriff for the period from January 1, 1948, to the time of escape, January 25, 1948. I am advised that the State refused to pay this amount because of Title 11, Section 102, Code of Alabama 1940, and various opinions of the Attorney General, namely, an opinion rendered June 19, 1946, to the Chief Examiner of Public Accounts found in Quarterly Report of Attorney General, Volume 43, page 45, and other opinions therein cited.

"Was the State of Alabama correct in refusing to pay my allowance and the feed bill for the period January 1 through January 25, 1948? You are further advised that my bill showed that the prisoners were recaptured on the same day they escaped."

In my judgment the State of Alabama should pay the sheriff's allowance and feed bill for the period from January 1 through January 25, 1948.

A sheriff who has prisoners in his custody is entitled to receive a certain amount for the cost of food and also a certain allowance for preparing and serving the food. Title 45, Section 144, Code of Alabama 1940, as amended by Act No. 309, General Acts 1945, page 502; also Title 45, Section 145, Code of Alabama 1940. The sheriff is required to make a monthly statement showing the number of prisoners cared for, and under certain circumstances the State Comptroller pays the feed bill and the allowance. Title 45, Section 148, Code of Alabama 1940.

Former opinions of this office have held that when a prisoner escapes, a sheriff can never collect as a feed bill or an allowance the amount expended in relation to such prisoner for the period of the month preceding the escape. Quarterly Report of Attorney General, Vol. 43, page 45; Quarterly Report of Attorney General, Vol. 2, page 291; Biennial Report of Attorney General, 1936-38, page 138. These opinions are based upon the concluding paragraph of Title 11, Section 192, Code of Alabama 1940, which provides as follows:

"No sheriff must be paid out of the state treasury any fee or allowance whatever, on account of any prisoner who has escaped from his custody; but the commissioners' court may, in their discretion, pay such fees and allowances as are payable by the county, notwithstanding the escape of the prisoner, if satisfied that such escape was not caused by the connivance or negligence of the officer having charge of him."

It is my opinion that the above quoted Code section should be interpreted to apply only when the prisoner remains at large. I do not think that it should have a field of operation if a prisoner is recaptured. In other words, if a prisoner escapes on the 15th of the month and is not recaptured by the time that the sheriff submits his statement under the provisions of Title 45, Sections 147 and 148, Code of Alabama 1940, it is my opinion that the provisions of this section apply, and that the sheriff cannot claim any feed bill or allowance for the period of the month from the first through the 15th or time of escape. This is true, however, only in the case where the prisoner remains at large at the time that the monthly statement is presented.

It is further my opinion that if the prisoner is recaptured at any time, the provisions of the above quoted Code section should not be construed to penalize the sheriff, and that in the event a prisoner is recaptured, the sheriff is entitled to claim his feed bill and allowance up to the time of escape. For example, if a prisoner escapes on the 15th of the month and is recaptured on the last day of the month, it is my opinion that the sheriff would be entitled to his feed bill for the first fifteen days of the month, plus his allowance for preparing and serving the food in respect to such prisoner.

Insofar as the opinions above listed are in conflict with this opinion, they are hereby overruled.

This office has formerly held that this Code section applies merely for the period during which the prisoner remains at large. Quarterly Report of Attorney General, Vol. 4, page 163. I am of the opinion that this construction should be followed.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

March 5, 1948.

Hon. J. L. Vaughn,
Clerk-Treasurer,
City of Dothan,
Dothan, Alabama.

Municipalities—Licenses—Insurance—Taxation.

A fire or marine insurance company which ceased writing policies during the tax year 1947 covering property in a municipality would not be liable for the license levied on fire and marine insurance companies under the provisions of Title 37, Section 739, Code of Alabama 1940, for the tax year 1948, by reason of the fact that said company has in force in the municipality during the tax year 1948 policies of insurance written by it during the tax year 1947.

Opinion by Assistant Attorney General Arbuthnot.

Dear Sir:

Your request for an official opinion bearing date of February 18, 1948, is as follows:

"I will thank you to kindly give me your opinion concerning the matter of insurance license as provided by Section 736 of Title 37 of Code 1940 as outlined below:

"Insurance Company 'A' has been doing Fire and Marine Insurance business in the City of Dothan for the past three or four years and paying the license as specified in the above Code Section. I am advised by their local agency that this company prior to December 31, 1947, but during 1947, discontinued taking new business in the City of Dothan. They have, however, a number of policies in the City of Dothan which they expect to allow to run to their maturity in 1948.

"The question is whether or not this company will be required to pay the percentage license provided under the above named section for the year 1948 by reason of the fact that they still have this previously written insurance in force."

I wish to call your attention to the fact that the municipal license or privilege tax on fire and marine insurance companies is levied under the provisions of Title 37, Section 739, Code of Alabama 1940, rather than under Title 37, Section 736, Code of Alabama 1940. Section 736, supra, levies a municipal license or privilege tax on "Insurance companies other than fire and marine."

Act No. 502, General Acts 1943, page 477, provides:

"That any city or town within the State of Alabama may fix and collect licenses for any business, trade or profession ~~done~~ within the police jurisdiction of such city or town but outside the corporate limits thereof; provided, however, that the amount of such licenses shall not be more than one-half the amount charged and collected as a license for like business, trade or profession done within the corporate limits of such city or town, fees and penalties excluded.
* * * * " (Emphasis supplied.)

Section 739, supra, provides in part as follows:

"No license or privilege tax or other charge for the privilege of doing business shall be imposed by any municipal corporation upon any fire or marine insurance company ~~doing business in such municipality~~, except upon a percentage of each one hundred dollars of gross premiums, less return premiums, on policies issued during the preceding year on property located in such municipality. Such per-

centage shall not exceed four percent on each one hundred dollars or major fraction thereof, of such gross premiums; and no credit or deduction of any kind shall be allowed or made on account of the cost of reinsurance by such company in a company not authorized to do business in this state. * * * * * (Emphasis supplied.)

The answer to your inquiry depends upon whether or not the insurance company under consideration is doing business in the city of Dothan during the tax year 1948 merely because of the fact that during said tax year policies previously written by such company are in force and effect during said tax year.

In the case of *Provident Savings Life Insurance Society v. Commonwealth of Kentucky*, 239 U. S. 103, 60 L. Ed. 167, 36 S. Ct. 34, it was held that the mere continuance of the obligation of existing policies in a foreign life insurance company, held by resident policyholders, together with the receipt of the renewal premiums upon such policies at the company's home office, may not be treated as constituting in itself the transaction of a local business in the State so as to make the insurance company liable for an annual privilege tax upon the amount of premiums so received.

"It has also been said that doing business refers to issuing policies, and not to paying policies which have been issued in the past." 29 Am. Jur., Insurance, Section 41. Citing *Knights Templars' & M. Life Indem. Co. v. Jarman*, 187 U. S. 197, 47 L. Ed. 139, 23 S. Ct. 108.

While it is true that the above cited cases deal with whether or not a foreign insurance company is doing business in a state, these cases are equally applicable to the question of whether or not an insurance company, either domestic or foreign, is doing business in a municipality.

In view of the above authorities, it is my conclusion that the company under consideration would not be doing business in Dothan, Alabama, during the tax year 1948, and, therefore, would not be liable for the license levied under the provisions of Section 739, supra, by reason of the fact that said company has in force in the city of Dothan, during the tax year 1948, insurance policies written by it previous to the tax year 1948.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

March 8, 1948.

Hon. Bryan McAfee,
Register, Circuit Court,
Morgan County,
Decatur, Alabama.

Registers — Fiduciary Funds — Costs and Fees — Witnesses —
Unclaimed Witness Fees.

1. Unclaimed witness fees in the hands of the register of the Circuit Court are fiduciary funds within the meaning of Title 58, Sections 30 and 37, Code of Alabama 1940.

2. Upon order of the court, such unclaimed witness fees in the hands of the register should be paid into the county treasury.

3. Upon the payment of unclaimed witness fees in the hands of the register into the county treasury, under the provisions of Title 58, Sections 30 and 37, Code of Alabama 1940, the register is entitled to a fee for receiving, keeping, and paying out, or distributing money other than that arising from sales pursuant to Title 11, Section 27, Code of Alabama 1940.

Opinion by Assistant Attorney General Sykes.

Dear Sir:

Your request for an official opinion bearing date of February 13, 1948, is as follows:

"Your official opinion will be appreciated on the questions as follows:

"1. Is a Register of the Circuit Court entitled to commissions on funds, such as witness fees and money for distribution, taken over from his predecessor in office, when such funds are paid to the county by virtue of an order of court due to the fact such money has never been claimed?

"2. If the foregoing question is answered in the affirmative then what percent of the money is such register entitled to retain as commission?

"By way of explanation I will state that my predecessor, at the time of his death, had on hand several thousand dollars, some as long as twenty years. The court will probably make an order requiring me, as Register, to pay said money to the county."

In my judgment the funds now in your hands should be paid into the county treasury upon order of the court, and you are entitled to collect a fee when such money is paid into the county treasury.

It has been held that unclaimed witness fees in the hands of the register in chancery should be disposed of according to Title 58, Sections 30 and 37, Code of Alabama 1940, and not pursuant to Title 11, Section 55, Code of Alabama 1940. Quarterly Report of Attorney General, Vol. 6, page 134; Biennial Report of Attorney General, 1936-38, page 139. In other words, such unclaimed witness fees constitute fiduciary funds and should be disposed of according to the law applying to fiduciary funds. Title 58, Section 37, Code of Alabama 1940.

Since unclaimed witness fees constitute fiduciary funds in the hands of the register, it is further my opinion that when such funds are paid into the county treasury and such funds are not derived from sales or are not funds received, kept, and paid out under decree in favor of an administrator ad litem, then the register, upon paying such funds into the county treasury, is entitled to the fee prescribed by Title 11, Section 27, Code of Alabama 1940, which provides in part as follows:

"Registers are entitled to the following fees for the following services:

* * * * *

" For receiving, keeping, and paying out or distributing money, other than that arising from sales, on the first one thousand dollars, one percent; on all over one thousand dollars and not over five thousand dollars, three-fourth of one percent; on all over five thousand dollars, not exceeding ten thousand dollars, one-half of one percent; and all over ten thousand dollars, one-fourth of one percent;"

You are advised, therefore, that as to the unclaimed witness fees, you are entitled to your commission as prescribed in the above quoted Code section. Quarterly Report of Attorney General, Vol. 24, page 49.

As to the other monies which came into your possession when the former register retired, we express no opinion, for the reason that you have not stated how such money was derived. It is possible that you are entitled to a fee under the same section which is above quoted. Since we do not have the facts in relation to the other funds referred to (other than unclaimed witness fees), we can express no opinion.

Very truly yours,

A. A. CARMICHAEL,

Attorney General.

March 8, 1948.

Hon. Gordon Persons, President,
Alabama Public Service Commission,
Montgomery 1, Alabama.

Public Service Commission—Motor Carriers.

Motor vehicle hauling fertilizer to a warehouse, where it is stored and later carried to a farm, is not exempt from having a certificate of convenience and necessity, under Section 2, Subsection 3 of Act No. 669, General Acts 1939, page 1064.

Opinion by Assistant Attorney General Kohn.

Dear Sir:

Your request for an official opinion, bearing date of November 21, 1947, is as follows:

"Section 2 of the 1939 Motor Carrier Act, gives certain types of transportation as being exempt from the provisions of the Act itself.

"Section 3 of Section 2, among other things, reads: ' - - - or fertilizer when it is hauled directly to a farm for a distance not exceeding 150 miles.'

"A question has now come up because of the fact that fertilizer is being hauled, not directly to a farm, but instead, goes into a warehouse and then, later, carried to the farm. In this particular case, the warehouse is owned by a farmers cooperative organization, but this does not alter the fact that the fertilizer does not go 'directly to a farm.'

"Will you please give us an official opinion as to whether or not a vehicle hauling as described above should obtain a certificate of convenience and necessity from the Public Service Commission."

In answering your question, it is my opinion that this motor vehicle should have a certificate of convenience and necessity in hauling fertilizer as outlined in your request. From your facts, this vehicle does not come within the exception, as it is not hauling fertilizer directly to a farm.

Section 2, Subsection 3 of Act No. 669, General Acts 1939, page 1064 (Title 48, Section 301(2), Subsection 3, Cumulative Pocket Part, Code of Alabama 1940), provides, in part, as follows:

"Section 2:—This Act shall not be construed to apply to: * * * * *

(3) * * * * * or fertilizer when being hauled directly to a farm, for a distance not exceeding one hundred fifty miles; * * * * *"

In 18 C. J., page 1045, it is said:

"DIRECTLY.—The primary idea of the word is of space—in a straight line, rectilinearly, undeviating, etc., and in this sense it may be defined as in a straight line or course, literally or figuratively; rectilinearly, without curving, swerving, or deviation; not circuitous; straight. The secondary meaning of the word are analogous to the idea of straightness in space; in a direct manner; in a straightforward way, without anything intervening; without the intervention of any medium. * * * * *"

The word "directly," as used in the statutory provision above quoted is plain and unambiguous and should be given its usual meaning, that is, for a motor vehicle to come within this exception, it should be hauling fertilizer directly to a farm.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

March 8, 1948.

Hon. Ralph P. Eagerton, Chief,
Department of Examiners of Public Accounts,
Montgomery 4, Alabama.

Lease sale contracts—Division of Purchases and Stores—
Title 55, Code of Alabama 1940, Section 108-9.

1. Lease sale contracts for the purchase of road construction equipment to be used by the State Highway Department of Alabama are subject to the provisions of Title 55, Code of Alabama 1940, Sections 108-9, establishing the Division of Purchases and Stores in the Department of Finance.

Opinion by the Attorney General.

Dear Sir:

Your request for an official opinion, bearing date of February 16, 1948, is as follows:

"It has been called to my attention that the State Highway Department through its Director, Honorable Ward W. McFarland, has established a practice of effecting 'Lease Sale Contracts' for road construction equipment.

"It is my further understanding that these contracts have been made without using the machinery set up by the Legislature under provisions of Title 55, Sections 108-109.

"The exercising of the practice of purchase of road equipment by lease sale contract under certain conditions is not questioned.

"However, the practice of making such contracts independent of the Division of Purchases and Stores of the Finance Department is questioned (Title 23, Section 29, also Title 55, Section 60-170).

"It is my understanding that the intent of the Legislature was to establish a system of mass purchases under conditions of competitive bidding whereby the State and subordinate municipal corporations would enjoy the benefits of such a system.

"It is my conviction that the letting of contracts for equipment under the above described conditions tends to defeat the provisions of said Title 55, Sections 108-109.

"You are respectfully requested to furnish me with an official opinion as to the legality of this procedure.

"You are referred to opinion of your office contained in Volume 17, Page 52."

It is my opinion that your inquiry should be answered in the affirmative.

Title 55, Code of Alabama 1940, Section 55, creates the Division of Purchases and Stores and makes the same a part of the Department of Finance.

This section gives this division the authority "to make and supervise the execution of all contracts and leases for the use or acquisition of any personal property." This authorization includes "lease sale contracts" for the purchase of road construction equipment for use by the State Highway Department of Alabama, and any contracts to be made for such purchases should be under supervision of said division.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

March 9, 1948.

Hon. M. C. Sivley, Register,
Circuit Court Etowah County, In Equity,
Gadsden, Alabama.

Costs and Fees—Sheriffs—Enforcement Officers of Alabama
Department of Public Safety—Distribution and Disposition of
Proceeds of Forfeited Property Sales—Title 29, Section 251, Code

of Alabama 1940 as amended by Act No. 126, General Acts 1947 (Ms.), approved July 17, 1947.

1. The Sheriff of Etowah County, although on a salary basis, is entitled to his statutory share of proceeds of forfeited property sales arising under Title 29, Section 251, Code of Alabama 1940, as amended by Act No. 126, General Acts 1947 (Ms.), approved July 17, 1947.

2. The statutory share of proceeds of forfeited property sales of enforcement officers of the Alabama Department of Public Safety arising under Title 29, Section 251, Code of Alabama 1940 as amended by Act No. 126, General Acts 1947 (Ms.), approved July 17, 1947, is remitted to the Director of Public Safety whose duty is to cover same into the Highway Patrol Fund.

Opinion by Assistant Attorney General Gallion.

Dear Sir:

Your request for an official opinion, bearing date of February 12, 1948, is as follows:

"I shall gratefully appreciate your official opinion on the questions herein submitted.

"Proposition: A motor vehicle is condemned, ordered sold, and the proceeds of sale ordered distributed according to law under Title 29, Section 251 of the 1940 Code of Alabama as amended by Act Number 126, approved July 17, 1947.

"Question 1. The Sheriff of Etowah County, Alabama, was placed on a salary in lieu of fee basis by (Act approved September 11, 1947). Is the Sheriff of Etowah County entitled to the money under said Code section inasmuch as the Sheriff is now on a salary basis?

"2. Where the officers involved are members of the Enforcement Division of Alabama Department of Public Safety, should I make payments to said officers or to the Enforcement Division?

"3. Under said section where proof is furnished by 'A,' Officer 'B' made the seizure, and Officer 'C' (the sheriff) makes the sale under advertisement, what share will 'A,' 'B' and 'C' receive under said Code section?"

It is my opinion that your first inquiry is properly answered in the affirmative.

By constitutional amendment, submitted August 26, 1947, provision was made allowing the Sheriff of Etowah County to be employed on a

salary basis. This constitutional amendment was proclaimed ratified by the Governor on September 11, 1947. Prior to submission and ratification of this constitutional amendment, an enabling act was passed at the 1947 session of the legislature, which is Act No. 318, General Acts 1947. Section 2 of this act reads as follows:

"Section 2. That when this act goes into effect said Sheriff of Etowah County shall continue to collect all charges, fees, compensation, allowances, and reimbursements heretofore or hereafter authorized to be collected by him, or by any of his deputies or assistants acting under and by virtue of their offices, and shall on the last day of each calendar month pay into the County Treasury of Etowah County, Alabama, all such monies received, or collected by him or any of his deputies or assistants, during such month."

In the case of *Mosely v. Kennedy*, 245 Ala. 448, 17 So. 2d 536, the Supreme Court of Alabama held that under Title 29, Section 102, Code of Alabama 1940, the amount of \$50.00 allowed the sheriff or other officer or person who furnished the evidence and brought about the conviction of a person charged with unlawful distilling and manufacture of prohibited liquors was not a "fee" paid a sheriff, because he is sheriff, but rather is a "reward to spur individual initiative and diligence." The cases of *Dallas County v. Kennedy*, 246 Ala. 558, 21 So. 2d 678, and *Jefferson County v. Dockerty*, 30 So. 2d 474, reaffirmed this decision. The *Dallas County* case, *supra*, made further comment that "if the sheriff is required to cover them (said monies) into the county treasury as a part of his compensation for official conduct, the intent of the Legislature would be entirely lost."

In an official opinion reported in Quarterly Report of Attorney General, Vol. 42, page 65, this office drew an analogy from the *Mosely* and *Dallas County* cases and held that where a gambling device had been seized, condemned and forfeited under Title 14, Section 288, Code of Alabama 1940, the officer making the seizure was entitled to one-half of the money taken from the device as provided by the statute, regardless of whether such officer is paid a salary or is on a fee basis.

From a consideration of the above Supreme Court decisions and the former official opinion of this office noted, it is my conclusion that such sums of money inuring to the sheriff in the instant case under authority of Title 29, Section 251, Code of Alabama 1940 as amended by Act No. 126, General Acts 1947 (Ms.), approved July 17, 1947, are similarly allowed the sheriff individually regardless of the fact that the sheriff is on a salary basis.

In the *Mosely* case, *supra*, the Supreme Court made further comment that the fees of sheriffs are specifically enumerated by Title 11, Sections 34 and 100, Code of Alabama 1940, and the fees so specifically provided do not include the \$50.00 reward allowed under Title 29, Section 102, Code of Alabama 1940. A similar substantiation of legislative intent is derived in the proposition herein discussed, inasmuch as the sheriff's

share of proceeds resulting from forfeited property sales is likewise not enumerated in the specific fees provided for in Title 11, Sections 34 and 100, supra.

You are therefore advised that it is my opinion that the Sheriff of Etowah County, although on a salary basis, is entitled individually to his statutory share of proceeds of sale in those cases arising under Title 29, Section 251, Code of Alabama 1940, as amended.

In your second inquiry you ask whether payment should be made to officers directly or to the Enforcement Division, where the officers involved are members of the Enforcement Division of the Alabama Department of Public Safety.

The Law Enforcement Division of the Department of Public Safety was established by proclamation of the Governor on December 1, 1945. This division of the Department of Public Safety is charged with the enforcement of the Alabama Alcoholic Beverage Control laws. The officers appointed to enforce these laws are known as Beverage Control Investigators, and such investigators are commissioned as highway patrolmen.

Title 36, Section 71, Code of Alabama 1940, as amended by Act No. 446, General Acts 1943, page 408, provides in part, as follows:

"* * No state highway patrol officer shall be entitled to any costs, fees or mileage for attending any courts, but instead the proper authority shall collect such costs, fees and mileage as may be due such officers for attendance on any court or for any official act and shall promptly turn the same over to the director of public safety who shall cover the same into the highway patrol fund and it shall become a part thereof, * * *" (Emphasis supplied).

It is noted here that specific statutory provisions appear to control the disposition of funds accruing to state highway patrolmen as the result of all official acts. In interpreting the above code section, it is my opinion that an officer's share of the proceeds of the sale of forfeited property arising under Title 29, Section 251, Code of Alabama 1940, as amended, should not be forwarded to the officer directly, but rather same should be remitted by you to the Director of Public Safety whose duty is to cover it into the Highway Patrol Fund. See Quarterly Report of Attorney General, Vol. 22, page 134, wherein a similar conclusion on the final disposition of proceeds is stated.

In order to answer your third inquiry it is necessary that additional information be furnished this office stating the official designation of officer "B" whom you refer to. As soon as this information is received an official opinion on point will be rendered you.

Very truly yours,

A. A. CARMICHAEL,
Attorney General.

March 16, 1948.

Hon. G. H. Boyd,
Register,
Circuit Court,
10th Judicial Circuit,
Birmingham 3, Alabama.

Registers—Guardians—Veterans—Cost and Fees.

Maximum costs and fees of one-half of one per centum as provided by Title 21, Section 169, Code of Alabama 1940, applies to partial settlements made in circuit court in equity.

Opinion by Assistant Attorney General Kohn.

Dear Sir:

Your request for an official opinion bearing date of January 31, 1948, is as follows:

"Section 169, Title 21, Code of Alabama 1940, reads as follows:

"Taxation of costs and fees.—The costs and fees exclusive of fees of the guardian ad litem incident to any partial or final settlement by any guardian subject to the provisions of this chapter shall be taxed in the amounts provided by the general statutes for like services, but of such costs and fees there shall not be taxed or charged against the estate of the ward, on any partial settlement, any amount in excess of one-half of one percentum of the amount of money with which the guardian is chargeable on the settlement as having received since the last preceding settlement and with which the guardian has not previously been charged. Provided the limitations contained in this section as to costs and fees shall not affect the commissions and fees otherwise payable to the general guardian and to guardians ad litem." (Underscoring mine).

"Your opinion is respectfully requested as to whether or not the limitation of one-half of one percentum referred to in said section applies to costs assessed in a partial settlement of a guardianship pending in the Equity Division of the Circuit Court where the estate is being administered under the provisions of Chapter 8, Title 21, Code of Alabama 1940. (Uniform Veterans' Guardianship Act)."

In my opinion, your question should be answered in the affirmative. Title 21, Section 169, Code of Alabama 1940, quoted in your letter of inquiry, is very clear and unambiguous. It plainly states that on a partial settlement by any guardian, subject to the provisions of this chapter (Title 21, Chapter 8, Sections 160-146, Code of Alabama 1940, Veterans' Guardianship), the costs and fees cannot exceed one-half of one percentum of the amount of money which the guardian is chargeable on the settlement as having received since the last preceding settlement and with which the guardian has not been previously charged.

Title 21, Section 163, Code of Alabama 1940, provides, in part, as follows:

"§ 163. Petition for appointment of guardian.—A petition for the appointment of a guardian may be filed in any court of competent jurisdiction by or on behalf of any persons who under existing law is entitled to priority of appointment. * * * * *

It is my opinion that any guardian for a veteran would be subject to Title 21, Chapter 8, Sections 160-146, Code of Alabama 1940. (Veterans' Guardianship), supra. When he makes a partial settlement either in the probate court or the circuit court in equity or any other court of like jurisdiction, the limitations as to amount of costs and fees as provided under Title 21, Section 169, Code of Alabama 1940, apply.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

March 17, 1948.

Honorable W. C. Beebe,
Attorney at Law,
Bay Minette, Alabama.

Counties—Liability for Tort.

A county is not liable in damages for the negligent operation of one of its trucks by a county employee when said employee is operating and using such truck in the discharge of his duty as such employee.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

Your request for an official opinion, bearing date of March 3, 1948, is as follows:

"I hand you herewith copies of two claims filed against Baldwin County, Alabama, claiming damages out of a collision of a car in which the claimants were riding with a county truck, one in favor of Lloyd Martin and the other in favor of E. F. Stuart. I am directed to request of you on behalf of Baldwin County, Alabama, an official opinion as to whether or not these claims are legal claims against Baldwin County, Alabama; and if so, out of what funds the sum should be paid in whole or in part. The claims raise the question as to whether or not ~~the~~ County is liable for the damages resulting from the negligence of a county employee in and about the operation and use of county property on a public highway in the discharge of his duty as such employee. For the purpose of requesting this

opinion the County does not deny the negligence of the county employee or that he was operating a county truck on the public highway in the line and scope of his employment. These questions, vel non, would be considered later in the event you should determine that the County is liable under the facts set out in the claims."

In answer to your questions, you are advised that, in my opinion, neither the claim of F. E. Stuart nor the claim of Lloyd Martin is a legal claim against Baldwin County.

In this regard, your attention is called to the case of *Moore v. Walker County*, 236 Ala. 688, 185 So. 175, wherein the Supreme Court had occasion to consider a question very similar to that presented in your request. In this case, the Supreme Court made the following observation:

"The immunity of the state from suits for the negligence of its officers and employees is rested upon the English common-law doctrine, adopted here, that the 'King can do no wrong.' Counties, likewise, in performing their governmental functions possess this same immunity, for the reason that they, in the performance of such duties, are but arms and aids of the state, operating for the state, and to that extent exercising a portion of its sovereignty.

"The authorities are practically unanimous in holding that a county is not liable to an individual for an injury sustained, 'because of its failure to exercise a governmental power with which it is clothed, or because it is not exercised in the manner most conducive to the safety of the public; or because of the negligence, or unskillfulness of its officers or agents, in the absence of a statute expressly declaring the liability.' (Emphasis supplied) *Askew v. Hale County*, supra; *Ex parte State*, 52 Ala. 231, 23 Am. Rep. 567; *Hamilton v. Jefferson County*, 209 Ala. 517, 96 So. 628; *First Nat. Bank of Scottsboro v. Jackson County*, 227 Ala. 448, 150 So. 690; *2 Dill Mun. Corp. Sec. 969*; *White v. Alabama Insane Hospital*, 138 Ala. 479, 35 So. 454."

It is to be noted from the above quotation that a county is not liable in damages when such county acting by and through its employee is exercising a governmental function in the absence of statute expressly declaring the liability. A diligent search of the acts and statutes of this State do not reveal any statutory law expressly declaring liability in cases of this kind.

You are, therefore, advised that, in my opinion, neither of the claims set out in your said request are valid claims against Baldwin County.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

March 17, 1948.

Hon. John D. Ayres, President,
Board of Commissioners,
City of Dothan,
Houston County,
Dothan, Alabama.

Employees' Retirement System—Municipalities.

1. An employee of a city who is a member of the Employees' Retirement System and who does not come within the exceptions set out in Section 5(c) of Act No. 515, General Acts 1945, page 734, as amended by Act No. 606, General Acts 1947 (Ms), approved October 13, 1947, must be retired at the age of seventy, regardless of the physical and mental fitness of such employee.

2. October 1, 1945, fixed as the date of the establishment of the Employees' Retirement System by Section 2 of Act No. 515, supra, is the date from which the five-year period referred to in Section 5(c), supra, must be computed.

Opinion by Assistant Attorney General Arbuthnot.

Dear Sir:

Your request for an official opinion bearing date of November 18, 1947, is as follows:

"The Board of Commissioners of the City of Dothan, Alabama, hereby request your official opinion on the following questions:

"(1) Is it mandatory that a city participating in the 'Employees' Retirement System of Alabama' under Title 55, Sec. 467, Code of Alabama, must retire all employees at the age of seventy years, regardless of physical and mental fitness—other than under the circumstances set out in Title 55, Sec. 260 (1) (b)?

"(2) For the purpose of computing the five year period referred to in Title 55, Sec. 260 (1) (b), is the date of 'establishing' an 'Employees' Retirement System' for city employees (by Resolution as provided in Title 55, Sec. 467) the date set by the board of control for participation in such system by a city's employees, as provided by said section 467, or is such date the same as provided in Title 55, Sec. 457?"

Cities may participate in the Employees' Retirement System under the provisions of Section 12 of Act No. 515, General Acts 1945, page 734, as amended by Act No. 606, General Acts 1947 (Ms.), approved October 13, 1947, which section, as amended, is in part as follows:

"(1) The governing board of any * * city * * * may by resolution legally adopted to conform to rules prescribed by the Board of Control, elect to have its officers and employees from whatever sources and in whatever manner paid, become eligible to participate in the retirement system. The terms 'officers' and 'employees' as herein used shall include those persons appointed or employed by individual officers and performing their duties in public offices. Acceptance of the employee of such an employer for membership in the retirement system shall be optional with the Board of Control and if it shall approve their participation, it shall set the date, which shall not be prior to October 1, 1946, when participation shall become effective, and then such employees may become members of the retirement system and participate therein as provided in the provision of this section. * * (2) Membership in the retirement system shall be optional for employees of the employer who are in the service of the employer on the date when participation becomes effective, and any such employee who elects to join the retirement system within one year thereafter shall be entitled to a prior service certificate covering such periods of previous service as shall be certified as creditable service by his employer for service rendered to such employer, or his predecessor, or the State, or in any other capacity approved by the employer and the Board, for which the employer is willing to make accrued liability contributions. Thereafter service for such employer on account of which the employer pays contributions, shall be considered also as creditable service. (3) Membership shall be compulsory for all employees entering the service of such employer after the date participation becomes effective."

The secretary of the Board of Control of the Employees' Retirement System informed me that the Board approved the participation of the City of Dothan in the Employees' Retirement System at a meeting held on December 17, 1947, the effective date of such participation being fixed by the Board as of July 1, 1947.

Section 5 of Act No. 515, supra, as amended by Act No. 606, supra, provides in part as follows:

"(c) Any member in service who has attained age seventy shall be retired forthwith, except that any member who is an official appointed for a term of years may remain in service until the end of the term of office for which he was appointed, and except that during the first five years after establishment of the retirement system, a person who shall have attained the age of seventy or above may be continued in the State service, on application of the employee approved by his department head, and by the Board of Control, if evidence of physical and mental fitness is furnished/
* * * *"

In answering your first inquiry, I assume that the employees referred to are members in service of the Employees' Retirement System.

Section 5(c), *supra*, contains the only exceptions in the law to compulsory retirement of a member in service of the Employees' Retirement System who has attained age seventy. If a member employee does not come within these exceptions, under the express wording of Section 5(c), *supra*, such employee "shall be retired forthwith" at age seventy.

It is therefore, my opinion that an employee of a city who is a member of the Employees' Retirement System and who does not come within the exceptions set out in Section 5(c), *supra*, must be retired at the age of seventy, regardless of the physical and mental fitness of such employee.

I wish to call your attention to the fact that under the provisions of Section 12, *supra*, membership in the Employees' Retirement System is optional with the employees of the city who were employed by the city on the date when participation in the system became effective, in the present instance July 1, 1947.

The conclusion reached in answering your first inquiry is applicable only to employees of the city who are members of the Employees' Retirement System.

Section 2 of Act No. 515, *supra*, is in part as follows:

"Section 2. Name and Date of Establishment. A retirement system is hereby established and placed under the management of the Board of Control for the purpose of providing retirement allowances and other benefits under the provisions of this Act for employees of the State of Alabama. The retirement system so created shall be established as of October first, nineteen hundred and forty-five. * * *"

It will be seen from the above section that the Employees' Retirement System was established as of October 1, 1945. The exception to compulsory retirement at age seventy as set out in Section 5(c) is applicable "during the first five years after establishment of the retirement system."

In view of the reference in both Section 2 and Section 5(c), *supra*, to the establishment of the Employees' Retirement System, it is my opinion that October 1, 1945, fixed as the date of the establishment of the Employees' Retirement System by Section 2, *supra*, is the date from which the five-year period referred to in Section 5(c), *supra*, must be computed.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

March 17, 1948.

Honorable G. H. Howard,
Probate Judge of Elmore County,
Wetumpka, Alabama.

Counties—Veterans—Offices.

1. Court of County Commissioners may pay office rent for U. S. Veterans Administration, Education and Training Section under Title 12, Section 12 (22) Code of Alabama 1940, as amended by Act No. 344, General Acts 1945, page 560.

Opinion by Assistant Attorney General Parker.

Dear Sir:

Your request for an official opinion, bearing date of September 25, 1947, is as follows:

"Please advise us whether or not Elmore County can legally pay office rent for the Veterans Administration, Training and Education Section.

"Your usual prompt attention will be greatly appreciated."

It is assumed from your question that the Veterans Administration, Training and Education Section, to which you refer is the Veterans Training Office of the State Department of Education, which is charged with the administration of 'on-the-job' training and other educational benefits to veterans, as outlined in U. S. Public Law 346, as Amended, of the 78th Congress.

I am of the opinion that your inquiry should be answered in the affirmative. Title 12, Section 12 (22), Code of Alabama, 1940, as amended by Act No. 344, General Act 1945, page 560 in referring to the authority of the Court of County Commissioners, provides in part as follows:

"The Court has authority: 22. To set aside, appropriate and use county funds or revenues, for the purpose of developing, advertising and promoting the agricultural, mineral, timber, water, labor, and all other resources of every kind of their respective counties, and for the purpose of locating and promoting agricultural, industrial, and manufacturing plants, factories and other industries in their respective counties. * * * *" (emphasis supplied)

The primary purpose of Public Law 346, is the rehabilitation, training and education of the veteran—all of which develops and promotes labor in the county. Therefore, it is my judgment that the county may appropriate its funds to pay the office rent for this purpose. Quarterly Report of the Attorney General, Vol. 23, Page 136.

If your inquiry refers to the payment of office rent for the U. S. Veterans Administration, Training and Education Section, located in your county, there is ample authority for such payments. Under the Code Section set forth above you would be justified in making payments of office rent for the promotion of labor in the county. For a review of the opinions of the Attorney General, authorizing the use of county funds, to supply office space to the federal agencies, see Quarterly Report of the Attorney General, Vol. 24, page 36.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

March 17, 1948.

Hon. Norvelle R. Leigh, Jr.,
Judge of Probate,
Mobile County,
Mobile, Alabama.

Trial Tax—Law Library Tax—Probate Courts.

1. Probate Court of Mobile County exercising equity jurisdiction concurrent with circuit court not required to assess trial tax under Title 51, Section 20, Code of Alabama 1940.

2. Probate Court of Mobile County exercising equity jurisdiction concurrently with circuit court not required to assess law library tax under Local Acts 1947 (Ms.), approved August 6, 1947.

Opinion by Assistant Attorney General Sykes.

Dear Sir:

Your request for an official opinion bearing date of November 18, 1947, is as follows:

"Please advise at your earliest convenience whether I am correct in reaching the conclusion that in fixing costs, charges and fees incurred while exercising Equity jurisdiction, given me by Act 281, approved August 11th, 1947, I have no authority to charge the trial tax, fixed by Section 20, Title 51, Code of 1940, nor the library fee, prescribed by local Act 248 for Mobile County, approved August 6th, 1947.

"You will observe that Act 281 of the last Legislature is on all fours with the Act giving the Probate Court of Jefferson County like jurisdiction. Sections 181 (1) et seq. pocket part Title 62,

Code 1940. My conclusion is based on opinions given by your predecessors, especially those found in: Quarterly reports of Attorney General, from October 1st, 1941, through December 31st, 1941, page 139, id, October 1st, 1939, through December 31st, 1939, page 335, relating to trial tax, and quarterly reports of Attorney General from January 1st, 1942, through March 31st, 1942, page 55, relating to library tax."

Your conclusions as to the trial tax (Title 51, Section 20, Code of Alabama 1940), and the library tax (Act No. 248, Local Acts 1947 (Ms.), approved August 6, 1947) are correct. Both taxes are chargeable only in those cases in the courts specifically enumerated in the enactments providing for said taxes respectively, neither of which include probate courts. Quarterly Report of Attorney General, Vol. 26, page 55; Quarterly Report of Attorney General, Vol. 25, page 138; Quarterly Report of Attorney General, Vol. 17, page 335.

Very truly yours,

A. A. CARMICHAEL,
Attorney General.

March 17, 1948.

Hon. F. G. Nunnelley, Chairman,
Calhoun County Commission,
Anniston, Alabama.

Taxes—Exemptions—Factories.

Factory used for the purpose of producing chenille products, dresses, clothing, and textiles is qualified for exemption provided for by Title 51, Section 3, Code of Alabama 1940.

Opinion by Assistant Attorney General Culverhouse.

Dear Sir:

Your request for an official opinion bearing date of January 16, 1948, is as follows:

"The Piedmont Development Company, Inc., a local non-profit corporation, organized in Calhoun County on November 4, 1946, has petitioned the County Commission, by written petition dated November 25, 1947 for exemption of county taxes for a period of five years commencing October 1, 1947 and expiring September 30, 1952.

"The petition shows that construction of the factory commenced on or about the date of incorporation, and that the factory is to be used for the purpose of producing chenille bedspreads, robes and

other chenille products, garments, dresses and clothing of all kinds, and textiles, fabrics and other related products.

"It appears that the factory has not been fully completed and approved by the architect as of this date.

"I will appreciate very much your opinion as to whether, under the above facts, we are entitled to grant the exemption requested, and if so for what years."

I am of the opinion that your county governing body, under the authority of Title 51, Section 3, Code of Alabama 1940, may grant the exemption herein requested. The following excerpts from the above mentioned code section are quoted for your information:

"§3. Exemption of certain factories, industries and plants.—For the purpose of encouraging the building, extending, and operation of factories for the spinning of thread and yarns, and the knitting and weaving of cloth and other fabrics of cotton and wool, and rayon and silk, and the manufacture of garments or wearing apparel, in this state, and plants for the purpose of building and manufacturing * * * * * the court of county commissioners, or other court or board having like jurisdiction of any county, * * * * * are authorized and empowered to remit the taxes assessed for all county and municipal purposes, except for county school and school district purposes, on such factories or plants and on all extensions or additions to such factory or plant as are already built and operated, and on all plants, works, machinery and other equipment of such factories or plants, or additions thereto, or extensions thereof, * * * * * for a period not exceeding ten years from the date of the incorporation or organization of such factories or plants, if incorporated and organized under the laws of the State of Alabama, or for a period not exceeding ten years from the date of being granted permission to do business in the State of Alabama, if a foreign corporation, or from the date of completion of such plant or factory, or from the date of the completion of such addition or extension thereof. * * * * *"

Your attention is invited to the express provisions of the above quoted code section which authorizes the exemption of factories, plants, etc. manufacturing garments or wearing apparel or knitting and weaving cloth and other fabrics of cotton, wool, rayon and silk.

In answer to your further inquiry as to the years for which the requested exemption may be granted, I invite your attention to the above quoted statutory provision that such exemptions may be granted for a period not exceeding ten years from the date of incorporation or not exceeding ten years from the date of completion of such plant or factory.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

March 18, 1948.

Hon. N. L. Boyd,
President,
Board of Revenue,
Etowah County,
Gadsden, Alabama.

Counties—Etowah County.

The Board of Revenue of Etowah County may, with the concurrence of its President, increase, alter, or diminish the area of any commissioners' district now lawfully existing in Etowah County. Act No. 197, General Acts 1878-79, page 227—Act No. 13, General Acts 1890-91, page 12—Act No. 267—Local Acts 1927, page 187, as amended by Act No. 305, Local Acts 1939, page 193.

Opinion by the Attorney General.

Dear Sir:

Your request for an official opinion dated March 8, 1948, is as follows:

"As President of the Board of Revenue of Etowah County, Alabama, I hereby respectfully request an official opinion as to whether or not the County Commission may by official act increase or decrease the districts of the County by taking from one district territory and adding it to an adjoining district or whether it will take an act of the State Legislature."

The Legislature, by Act No. 197, General Acts 1878-79, page 227, granted authority to the Commissioners Court of Etowah County as follows:

"Section 1. Be it enacted by the General Assembly of Alabama, That the commissioners court of Etowah County, and of the county of Cullman, be and they are hereby authorized and required to lay off the said county of Etowah, and county of Cullman into four commissioners districts, as near equal in population as may be."

Additional authority to the Commissioners Court of Etowah County was granted by Act No. 13, General Acts 1890-91, page 12, which is in part as follows:

"Sec. 3. Be it further enacted, That the territory in any one or more of said districts as now laid off and bounded may be increased, altered or diminished by the court of county commissioners of said county by order entered on the minutes as any regular term thereof, the full board, with the judge of probate concurring therein."

In creating the Board of Revenue of Etowah County (Act No. 267, Local Acts 1927, page 187), the Legislature preserved the authority aforementioned. Section 4 of said act provides in part as follows:

"Section 4. The board of revenue of Etowah County shall have all the jurisdiction and all the powers which are now exercised by the commissioners' court of Etowah County, and all the jurisdiction and all the powers which are now or may hereafter be by general law vested in the court of county commissioners or board of revenue. * * * The President of said board shall perform all duties and services and exercise all the powers which are now or may hereafter be by law required of, or vested in, the probate judge as principal judge of the court of county commissioners."

Therefore, it is my opinion that the Board of Revenue of Etowah County, with the concurrence of its President, is empowered to increase, alter, or diminish the territory in any one or more of the commissioners' districts now existing pursuant to the legislative authority aforementioned.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

March 18, 1948.

Honorable W. H. Wilson,
Judge of Probate,
DeKalb County,
Fort Payne, Alabama.

Elections—Primaries.

1. Under the provisions of Title 17, Section 344, Code of Alabama 1940, as amended by Act No. 601, General Acts 1947 (Ms.), approved October 9, 1947, where a political party has legally called a primary election and only one person qualifies for each office to be filled in said primary election, such person's name shall not be printed on the ballot, and it is not necessary that any primary election for that party be held—those persons legally qualifying automatically become the nominees of that party.

2. Where a political party has legally called a primary election and some of the candidates qualifying in said primary are without opposition, the names of such candidates shall not be printed on the ballot in said primary election.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

Your request for an official opinion, bearing date of March 2, 1948, is as follows:

"The DeKalb County Republican Executive Committee called a primary election to nominate candidates for county office this year, and gave due and timely notice thereof. I am advised that in taking this action this committee had in mind the provisions of the Merrill Act (H. 493) passed by the 1947 Legislature. In accordance with the committee's call one candidate has qualified in the Republican Primary for each of four county offices: Tax Assessor, Tax Collector and for the two members of the County Board of Education to be elected this year. In other words, there is but a single entrant in the Republican Primary in this county for each of four offices to be filled in the 1948 election. Neither has opposition in his party's primary.

"In addition, there are several single entrants for nomination for office in the Democratic Primary in this county.

"I have been informed that the 1947 Legislature also passed an act which provides, in substance, that in cases where but one candidate qualifies for office in a party primary election, such candidate automatically becomes his party's nominee for that office, and his name is not to be printed on the ballot for the primary in which he has qualified as a candidate.

"In view of the foregoing, this office respectfully submits the following questions to your office and requests an opinion thereon:

"1. Do the four who have qualified, singly, as candidates in the Republican Primary in DeKalb County—who do not have opposition—automatically become their party's nominees for these offices, and, under these circumstances, is it necessary for this office to have a ballot printed for the Republican Primary in this county, or is it necessary for the Republican Party to 'follow through' and hold a primary election on May 4, 1948 in order to get the names of their candidates on the ballot for the general election? To put it another way, may the names of those who have qualified as candidates for office subject to the Republican Primary and who do not have opposition in the primary be legally placed upon the ballot as Republican nominees, without the formality of holding a Republican Primary election on May 4th?

"2. Should this office have the names of candidates who are running without opposition in the Democratic Primary in this county printed on the ballot for that party's primary?

"Your opinion on these questions at the earliest possible date will

be greatly appreciated.

Before answering your questions, I wish to direct your attention to Title 17, Section 344, Code of Alabama 1940, as amended by Act No. 601, General Acts 1947 (Ms.), approved October 9, 1947, which reads as follows:

"The chairman of the State executive committee of each party entering a primary election shall, not less than forty days prior to the date of holding the election, certify to the Secretary of State the names of all candidates for nomination to Federal, State, circuit, and district offices, the State Senate and House of Representatives, and all other candidates, except candidates for county offices. The chairman of the county executive committee of each party entering the primary election shall, not less than forty days prior to the date of holding the election, certify to the probate judge the names of all candidates for nomination to county offices. The Secretary of State shall, not less than thirty days prior to the date of holding the primary election, certify to the probate judge of every county in which the election is to be held the names of the candidates for nomination to Federal, State, circuit, and district offices, the State Senate and House of Representatives, and all other candidates, except candidates for county offices. The probate judge of each county shall have the ballots prepared for the primary election. If a legally qualified candidate for nomination to an office is unopposed when the last date for certifying candidates has passed, his name shall not be printed on the ballots to be used in the primary election, and he shall be the nominee of the party with which he has qualified for the office. The probate judge shall have the ballots so printed that the names of the opposing candidates for any office to be voted for by voters of more than one county shall, as far as practicable alternate in position upon the ballot so that the name of each candidate shall occupy, with reference to the name of every other candidate for the same office, first position, second position, and every other position, if any, upon an equal number of ballots. When printed, the ballots shall be distributed impartially and without discrimination by the probate judge."

It is to be noted from the plain language of the above quoted section, as amended, that if a legally qualified candidate for nomination to an office is unopposed when the last day for certifying candidates has passed, his name shall not be printed on the ballot to be used in the primary election, and such person shall automatically become the nominee of the political party holding the primary election.

In regard to your first question, I assume, in view of the statements contained in your letter, that the DeKalb County Republican Executive Committee has complied with Act No. 552, General Acts 1947 (Ms.), approved October 2, 1947, in calling its primary election. If this assumption be correct, then you are advised that it is not necessary for a Republican primary to be held in your county on May 4, 1948.

As pointed out above, it plainly appears that the names of those persons who run for nomination in a primary election without opposition shall not be printed on the ballot to be used in such primary. Therefore, since all the persons running for nomination in the Republican primary called in your county are unopposed, their names shall not appear on the ballot, and it follows that there will be no ballot to be voted on by the Republicans in their primary.

It is further my opinion that under the provisions of Act No. 552, supra, these Republican candidates who are running unopposed in the Republican primary should have their names certified as Republican candidates in the general election since, under the provisions of Section 344, as amended, supra, they automatically and by operation of law become the nominees of that party.

In answer to your second question, you are advised that under the provisions of Section 344, as amended, supra, the names of those candidates who are running for nomination in the Democratic primary in your county who are unopposed shall not be printed on the ballot. They, too, automatically and by operation of law become the nominees of the Democratic party, and their names shall appear on the ballot in the general election as the candidates of that party.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

March 19, 1948.

Honorable John G. Hosey,
Chairman, Board of Registrars,
Jefferson County,
102 Courthouse,
Birmingham 3, Alabama.

Board of Registrars—Jefferson County—Authority of County Governing Body.

Title 17, Section 56, Code of Alabama 1940.

1. The Board of Registrars of Jefferson County is an independent agency of the State established for a state-wide purpose rather than a county authority under the jurisdiction and control of the county governing body.

2. The county governing body of Jefferson County is without authority to adopt resolutions controlling and affecting the policies of the county board of registrars.

Opinion by Assistant Attorney General Hardin.

Dear Sir:

Your request for an official opinion, bearing date of December 2, 1947, is as follows:

"The following resolution was passed on November 25, 1947 by the Jefferson County Commission:

"BE IT RESOLVED, by the Commission of Jefferson County, Alabama, that the Board of Registrars of Jefferson County, Alabama, shall furnish and provide copies of the names and addresses of qualified electors of Jefferson County, Alabama, to persons requesting same only upon the payment of said persons of \$3.00 per one thousand names which said sums so collected by the Board of Registrars shall be paid by said Board of Registrars to the County Treasurer to be credited to the County General Fund."

"Will you please give me a ruling as to whether the County Commission has the legal right to pass this resolution. Does the County Commission have the legal right to pass any resolution regarding the policies of this office."

In my opinion, your inquiry finds answer in the decision of the Supreme Court of Alabama rendered in the case of *Garner v. McCall*, 235 Ala. 187, 178 So. 210, wherein it was held that the Board of Registrars of Jefferson County is an independent agency of the State established for a state-wide purpose rather than a county authority subject to the jurisdiction and control of the governing body of the county.

In the above case, the Supreme Court considered and treated the applicability of provisions of the Civil Service Act of Jefferson County to that person appointed by the Chairman of the Jefferson County Board of Registrars as chief clerk of such board under the provisions of Act No. 289, General Acts 1927, page 274, which act provides that in counties having a population of more than 150,000 (changed by the Code Committee to read 300,000) the Chairman of the Board of Registrars shall be furnished with an office, shall have the authority to employ a chief clerk and other clerical help, shall receive, in addition to the compensation now provided by law, an additional sum of \$3,000 per year, payable from the funds of the county, and shall be vested with the authority and shall perform all the duties of the judges of probate of the other counties of the State with reference to the registration of voters. The provisions of such act, with minor changes not pertinent hereto, are now found codified as Title 17, Section 56, Code of Alabama 1940.

In its opinion in the *Garner* case, *supra*, the Court stated that, when finally analyzed, the sole inquiry involved was whether the county board of registrars is a county or State authority. In my opinion, the same question is here involved and because of the peculiar applicability of the opinion in the *Garner* case to your inquiry, I shall herewith quote at length from that opinion.

In such opinion, the Court after treating the constitutional origin of the county boards of registrars as found within Section 186, Constitution of Alabama 1901, states that the Court has fixed certain standards for determining whether one is a county officer, setting forth the following:

"(4) If he is elected by the vote of a single county confined in duty to its territory, he is said to be a county, not a state, officer. Ex parte Wiley, supra. And this may be so, though he exercises some duties on behalf of the state. McLendon v. Empire Mining Co., 199 Ala. 482, 74 So. 937.

"County officers are defined by some authorities as those by whom the county performs its usual functions; its functions of government. 15 C. J. 481, note 81.

"(5) In this instance the members of the board of registration are not elected nor appointed by any authority in the county, nor paid by the county (except to supplement the salary of the chairman in some counties), and perform functions pertaining to a system of state-wide proportions, though they are limited in their performance to the county for which they were appointed.

"Without question, the program of registration of electors and the whole election system in the state as planned by the Constitution is the exercise of a state function. All the details are parts of the state set-up regulating the suffrage of Alabama residents. * * * "

After comparing the similarity of the system of registration provided for by law with that system designed for the operation of the educational system of the State, the Court states, without equivocation, that under the authorities of this State, the county boards of registrars are State agencies and not county authorities, concluding with the following statement:

"The board of registrars is as much an independent agency of the state for a state-wide purpose as the county board of education.

"We do not think the Legislature meant to divest control of one of its state-wide operations from its agency set up for that purpose, and put it under the supervision of another authority intended only for local jurisdiction, and local purposes, and having only local color."

In view of the above, it is my opinion that, the Board of Registrars of Jefferson County being an independent agency of the State established for a state-wide purpose, the county governing body of Jefferson County is without authority to adopt the resolution set forth in your inquiry, and that such resolution is not binding upon the Jefferson County Board of Registrars.

You lastly inquire as to the authority of the county governing body to adopt resolutions regarding the policies of the county board of registrars. In my opinion, the county governing body possesses no such authority. As stated above, the county board of registrars is an agency of the State, not the county; the members of such board are not county officers subject to the direction of the county governing body, but rather hold office by virtue of their appointment by the State Board for the Appointment of Registrars, and any such member may be removed at the will of the Appointing Board.—*Cooper v. State*, 226 Ala. 288, 147 So. 432.

In view of the above facts, it is my opinion that the county governing body exercises no jurisdiction over the policies of the county board of registrars.

Very truly yours,

A. A. CARMICHAEL,

Attorney General.

March 19, 1948.

Hon. Lecil Gray,
Judge of Probate,
Walker County,
Jasper, Alabama.

License—Automobile.

City of Cordova entitled to distribution of monies collected for licenses from owners of vehicles who reside within the extended city limits.

Opinion by Assistant Attorney General Culverhouse.

Dear Sir:

Your request for an official opinion, bearing date of November 13, 1947, is as follows:

“On October 9, 1947, Act #580 (HB 1011) was approved altering the boundaries of the town of Cordova, Alabama effective immediately. I have requested a copy of this Local Act from Sibyl Pool but as yet have not received same; however, the actual boundaries are not pertinent to the question I propound to you.

“Section 710, Title 51, 1940 Code Pocket Edition, says:

“‘All motor vehicle licenses under this article shall become due on the first day of October of each year, and delinquent on November 16 (sixteenth) next thereafter.’

"This is a 1943 amendment to the above cited section.

"The City of Cordova now raises the question that it is entitled to 30% of the automobile licenses purchased by those people living within the new city boundaries, under Section 713 of Title 51, 1940 Code.

"Since the Local Act referred to above was not approved until October 9, 1947 and all licenses were due October 1, 1947, I am of the opinion that Walker County, instead of the town of Cordova, would be entitled to the license money this year under Section 713, Title 51.

"Please give me your opinion as to whether or not the town of Cordova is entitled to a 30% distribution of the license tags sold this year.

"If your answer is in the affirmative, please advise me whether or not they would be entitled to their distribution from the 9 day of October only, or for all tags purchased this year.

"Please give this your prompt attention as I have already forwarded to the State and to the County their distribution of these licenses, on the assumption that they are entitled thereto and I could not hold my report until I could receive an opinion, and if your opinion is that Cordova is entitled to a distribution I will ask for a refund from Walker County and the State of Alabama."

I am of the opinion that the City of Cordova is entitled to a 30% distribution of the money collected for automobile license tags sold after October 9, 1947 to residents within the enlarged city boundary.

My conclusion is based upon the provisions of Title 51, Section 713, Code of Alabama 1940, and the well settled rule of law that, in the absence of a statutory provision therefor, license taxes do not constitute a lien on the property of the person assessed. *Corpus Juris*, Vol. 37, Page 250; *United States v. Seward Peninsular Railroad Company*, 203 Fed. 963, 122 C. C. A. 265; *Henry v. Drennen Motor Car Company*, 235 Ala. 559, 180 So. 563.

Title 51, Section 710, Code of Alabama 1940 provides that the due date for the payment of automobile licenses is October 1, and the delinquent date is November 16, next thereafter. This code section does not create a lien on such vehicles on October 1.

Title 51, Section 713, *supra*, provides for the distribution of the money collected for automobile license tags. The pertinent provisions of this code section are as follows:

"The money collected as motor vehicle and trailer license taxes, less all the expenses necessary for the * * * * shall be distributed

as follows: 70% to the state and 30% to the incorporated city or town in which the owner of the motor vehicle resides. * * * * If the owner of a motor vehicle does not reside in an incorporated city or town, then 80% shall go to the state and 20% to the county in which the owner of the motor vehicle resides."

The above quoted statutory provision states that the distribution of the money collected is dependent upon the residence of the owner of the vehicle. It is my opinion that the legislative intent was, that the distribution of such money was determined by the residence of the owner of the vehicle at the time of payment of such license. Therefore, the City of Cordova is entitled to its share of the money collected for automobile licenses after October 9 from vehicle owners who reside within the extended city limits.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

March 19, 1948.

Hon. Norvelle R. Leigh, Jr.,
Judge of Probate,
Mobile County,
P. O. Box 7,
Mobile 1, Alabama.

Elections—Poll Tax.

1. Under Constitution of Alabama 1901, Section 194, each inhabitant of the State of Alabama, over the age of twenty-one years, and under the age of forty-five years, who is not exempt by law, is subject to the payment of poll tax, regardless of his status as a citizen.

2. Quarterly Report of Attorney General, Vol. 42, page 69, modified.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

Your request for an official opinion, bearing date of December 4, 1947, is as follows:

"Our Board of Registrars will continue in session through February 1, 1948.

"All of the new registrants, immediately on receiving their certificates of registration, come to this office. Ex-service men come

to obtain their certificates of exemption from payment of poll taxes, and the others (not exempt) for the purpose of ascertaining how much poll taxes must be paid in order to place them on the list of qualified electors. Among those not exempt, some are aliens, who have become naturalized citizens, and others are people who have received full pardons, restoring their civil and political rights, after having been convicted of offenses which disfranchised them. Our Attorneys-General have twice expressed the opinion that an alien, who became naturalized, is liable for all poll taxes from the time he became an inhabitant of this state and is over the age of twenty-one and under forty-five, regardless of when he became a naturalized citizen. Rep. Atty. Gen. 1934-36, page 408, Quarterly Reports of Attorney General, January 1, 1940, through March 31, 1940, page 133. These opinions, if I read them aright, are based on the fact that Section 194 of Alabama Constitution provides for the payment of poll taxes by all inhabitants, regardless of when they became naturalized citizens. In short, residence, and not citizenship, seems to have been made the determining factor.

"However, on March 20, 1946, the Attorney General held that a full pardon of one convicted of a crime, disqualifying him of the right to vote, restores such person to the same citizenship held by him at the date of his conviction, and that such person is not due to pay any poll taxes becoming due between the date of conviction and the date of pardon. Quarterly Reports Attorney General from January 1, 1946, through March 31, 1946, page 69. This opinion seems to make citizenship, and not inhabitancy or residence, the guide in determining liability. Yet, in the last paragraph of this opinion, the Attorney General says: 'We may suggest that the domicile of the convict at the time of his conviction is not changed by virtue of his being placed in the custody of the State in another county. This latter residence is not voluntary on his part and further, if such person was a registered voter at the time of his conviction and if after his pardon he returns to the county of his domicile at the date of his conviction it is not necessary for him to again register.' (Emphasis supplied.)

"I will greatly appreciate it if you will advise me at your earliest convenience whether there is any conflict between the first two and the last above cited opinions, and, if so, which of them shall we used as a guide in advising registrants as to the amount of poll taxes necessary to be paid by them. In other words, shall we continue to require aliens, who have become naturalized citizens, to pay poll taxes from the time they became inhabitants of this state, and are over the age of twenty-one and under forty-five, regardless of when they became naturalized, and shall we grant exemptions from poll taxes from date of conviction to date of full pardon of those convicted of disqualifying offenses?

"We desire, needless to say, to give correct advise to those not exempt as to the necessary amount of poll taxes required to be

paid in order to be placed on the list of qualified electors.

"Quite a few former aliens and pardoned convicts are registering, and, for that reason, we will appreciate an opinion from you at your earliest convenience as to what course we shall pursue in advising these people relative to the poll taxes they should pay in order to make them qualified electors."

I have carefully considered the former opinions of this office cited by you in your request for opinion in the light of Constitution of Alabama 1901, Section 194, and am convinced that the opinion last cited is in error insofar as it holds that an inhabitant of this State who is convicted of a crime which disqualifies him from registering or voting under Constitution of Alabama 1901, Section 182, is not subject to the payment of poll tax which becomes due between the date of his conviction and the date he receives a pardon which restores his citizenship with the right to vote.

Section 194, *supra*, reads in pertinent part:

"The poll tax mentioned in this article shall be one dollar and fifty cents upon each male inhabitant of the state, over the age of twenty-one years, and under the age of forty-five years, who would not now be exempt by law; * * *." (Emphasis supplied.)

This section now applies to all inhabitants of the State, male and female, within the specified ages. See the XIX Amendment to the Constitution of the United States as construed by the Supreme Court of Alabama in *Graves v. Eubank*, 205 Ala. 174, 87 So. 587.

It is very clear from the above quoted constitutional provision that the poll tax is levied upon each inhabitant of the State, over the age of twenty-one years, and under the age of forty-five years, unless he is exempted by law. Under this section, a person is subject to the payment of poll tax by virtue of being an inhabitant of the State, and not by virtue of being a citizen thereof.

Consequently, an inhabitant of this State, within the specified ages, is subject to the payment of poll tax, even though such inhabitant might not be a citizen, either because he is an alien and has not been naturalized or because he is disqualified from registering or voting by reason of conviction of a crime specified in Section 182, *supra*.

The former opinions of this office appearing in Biennial Report of Attorney General, 1934-36, page 408, and Quarterly Report of Attorney General, Vol. 18, page 133 (cited in your request for opinion), are in accord with the views here expressed and are here reaffirmed. The former opinion of this office appearing in Quarterly Report of Attorney General, Vol. 42, page 69 (also cited in your request), is not wholly in accord with the views here expressed, and to the extent of the conflict is hereby modified to conform hereto.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

March 19, 1948.

Hon. F. B. Lloyd,
Probate Judge,
Crenshaw County,
Luverne, Alabama.

Elections—Polling Lists.

Act No. 482, General Acts 1947, approved September 25, 1947;
Act No. 655, General Acts 1947, approved October 9, 1947; Title
17, Sections 77-90, Code of Alabama 1940.

1. When Judge of Probate has no means of ascertaining the geographical boundaries of the districts or other subdivisions of the election precincts or wards of the county, and is without information as to the district or other subdivision in which each qualified voter is registered, he can only furnish polling lists of the qualified voters of the county by precincts or wards.

2. The governing bodies of the various counties are charged with the duty of dividing election precincts as required by law, and when any precinct has been so divided, must immediately furnish a description of the boundaries of said district or other subdivision to the Judge of Probate of the county.

Opinion by Assistant Attorney General Hardin.

Dear Sir:

Your request for an official opinion, dated January 28, 1948, is as follows:

"I respectfully request your opinion concerning Acts No. 482, 483, and 655 passed by the Alabama Legislature during regular session, 1947. These acts amend Sections 38 and 40, Title 17, Code of Alabama 1940 and provide in substance as follows: The Judge of Probate shall furnish a list of qualified electors to the inspectors of each voting precinct or box and the list shall contain only the names of such persons entitled to vote at each box or voting place. However, the acts referred to above further state that the Probate Judge shall furnish such lists, etc., 'where any precinct has been divided or subdivided, if not within a city or incorporated town, and by wards or other subdivisions, if within a city or incorporated town.'

"Practically all of the beats in Crenshaw County have more than one box or voting place, but I can find no record to indicate that there has ever been definite geographical boundaries established for the various boxes in each beat. The above quoted language of the acts would seem to imply that where no definite geographical boundaries had been established for each voting place that the Probate Judge would be under no duty to furnish such lists, etc.

"Under the facts as stated above would it be my duty to furnish such lists to the voting boxes or precincts in this County? If your answer is in the affirmative please advise the proper procedure in ascertaining each list where no definite geographical boundaries have been established within each beat."

Under the facts as stated in your request, it is my opinion that you can only be charged with the duty of furnishing to the election officials of each voting district a list of the qualified voters of the precinct in which said voting district is located.

This opinion I base upon the fact that you inform me that you are unable to discover any record as to the geographical boundaries established for the various voting districts of the precincts which have been so divided, and secondly, upon the fact that the list of qualified voters to be prepared by you and furnished said election officials is to be taken from the returns filed with the office of the Judge of Probate by the board of registrars of the county. The statute governing such returns, prior to the enactment of Act No. 483, General Acts 1947, approved September 25, 1947, only required the list so prepared by the board of registrars to show the precinct in which those persons registered resided, and made no mention of the district or other subdivision involved should a precinct have been so divided.

The portion of Act No. 482, *supra*, pertinent to your inquiry is as follows:

"Section 3. That Section 40, Title 17, Code of Alabama 1940 be and the same is hereby amended to read as follows: Section 40. The judge of probate shall, from the registration list returned to his office, including those registered prior to January 1, 1903, make correct alphabetical lists of the qualified electors registered by precincts, by districts or by subdivisions thereof where the precinct has been divided or subdivided, if not within a city or incorporated town, and by wards and by other subdivisions, if within a city or incorporated town, and no others, which lists shall be certified by him officially to be full and correct copies of the lists of registered electors for each of such precincts, districts, wards, or other subdivisions, respectively, and the names of no others, as the same appears from the returns of the board of registrars on file in this office.

The judge of probate shall deliver or cause to be delivered to the inspectors in each precinct, each district, each ward or each other

subdivision, one copy of the list prepared for such box or voting place immediately preceding every general, primary or special election, and the delivered list shall contain only the names of persons qualified to vote at such box or voting place except that for purposes of information only there may be delivered to such inspectors lists prepared for other boxes or voting places." (Emphasis supplied.)

Substantially the same provisions are found set out in Act No. 655, General Acts 1947, approved October 9, 1947, which act pertains to the establishment and location of voting places in the various precincts, districts, wards or other subdivisions of the counties or cities.

I again call your attention to the fact that the above quoted portion of Act No. 482, *supra*, only provides that you certify the list of qualified electors furnished by you to the various election officials to be correct insofar as the same appears from the returns of the board of registrars on file in your office. If, as you have informed me by telephone, such returns list the qualified electors of the county by precinct only, you can then furnish said list of qualified electors required of you by Acts No. 482 and 655, *supra*, by precinct only. This is particularly true in view of the fact that you state yourself to be unable to ascertain by record the geographical boundaries of the voting districts in those precincts which have been so divided.

I feel it pertinent here to point out that if any of the election precincts of the county have been divided into election districts, a record of such should be on file in your office. Title 17, Section 82, Code of Alabama 1940, provides that:

"§ 82. Boundaries of precincts fixed and posted.—Whenever any election precinct has been divided or subdivided into election districts, the court of county commissioners or board of revenue, or other governing board of said county, making such division or subdivision, shall immediately cause a description of the boundaries of said election districts to be filed in the office of the judge of probate, and shall post a copy thereof at the court-house door of such county."

Therefore, if any of the election precincts have been lawfully divided into election districts or other subdivisions, I would call upon the county governing body to furnish me with the notice required under the above statute in order that you may fully comply with the provisions of Acts 482 and 655, *supra*, with reference to the preparation and furnishing of the required voting lists for each district or other subdivision.

It should also be noted that our statutes afford no authority for the division of any election precinct unless said precinct contains more than 300 qualified voters. If any precinct contains more than 300 qualified voters, division is mandatory, and upon such division into election districts, only one voting place may be designated for each district. Title 17, Sections 77-90, Code of Alabama 1940; Quarterly Report of Attorney General, Vol. 36, page 69; Biennial Report of Attorney General, 1936-38, page 527.

As noted, your request is predicated upon the existence of a situation unwarranted by statute, and my opinion, in effect, advises you to discharge as completely as you may under the existing circumstances the duties imposed upon you by Acts No. 482 and 655, supra, further advising that immediate steps be taken by the county governing body, as required by law, to alleviate the now existing situation in order that you may fully discharge the duties imposed upon you under the terms of the acts above referred to.

Very truly yours,

A. A. CARMICHAEL,
Attorney General.

March 19, 1948.

Hon. C. C. Horton,
State Service Commissioner,
Department of Veterans' Affairs,
P. O. Box 1509,
Montgomery, Alabama.

License—Business or Occupational—Exemption—Veteran.

1. If value of qualified veteran's interest or equity in property is less than \$7,000.00, he is qualified for the \$35.00 exemption from business or occupational license taxes, regardless of the total value of the property.

Opinion by Assistant Attorney General Culverhouse.

Dear Sir:

Your request for an official opinion bearing date of February 24, 1948, is as follows:

"This Department requests an official opinion construing the provisions as stated in the last sentence of Section 2, Act No. 698, 1947 Legislature, which amends Section 6 of Act 353, approved July 6, 1945, which is quoted as follows:

" 'Provided, however, that any veteran whose property, both real and personal, is valued at \$7,000 or more or whose net annual income is \$3,000 or more shall not be granted the exemption granted herein but shall be granted an exemption of \$15 on his licenses from each the City, County and State.'

"The question at issue is whether or not a veteran of World War II, otherwise qualified for entitlement to \$35 exemption of business or occupational licenses, under Act 353, approved July 6, 1945, as amended by Act No. 698, approved October 13, 1947, may be granted such \$35 exemption from each the city, county and state, if the fair cash market value of his equity in property, both real

and personal, is less than \$7,000. Is the effect of the provisions 'valued at \$7,000 or more' that such veteran is entitled to exemption of \$35 if his interest or equity in the property is less than \$7,000, or that he is not entitled to such exemption unless the total value of the property is less than \$7,000?"

I am of the opinion that if the value of a qualified veteran's interest or equity in property, both real and personal, is less than \$7,000.00, he is entitled to the \$35.00 exemption from business or occupational license taxes, regardless of the total value of the property. Act No. 353, General Acts 1945, page 570, as amended by Act No. 698, General Acts 1947 (Ms.), approved October 13, 1947, provides for such exemption. The pertinent proviso of the amended act reads as follows:

"Provided, however, that any veteran whose property, both real and personal, is valued at \$7,000.00 or more, or whose net annual income is \$3,000.00 or more shall not be granted the exemption provided herein but shall be granted an exemption of \$15.00 on his licenses from each the city, county and State."

The question presented in your request is determined by the generally accepted legal definition of the word "property." Therefore, I invite your attention to the following definitions of that word as found in Words and Phrases, Vol. 34, page 464:

(1) "The term 'property' denotes interests in things and not the things themselves. Restatement, Trust, Section 2(c)."

(2) "word 'property' in its legal sense means valuable right or interest in thing, rather than thing itself. Meek v. State, 185 N. E. 899."

(3) "'Property,' though frequently applied to thing itself, strictly means only rights of owner in relation to it. Newmarket Manufacturing Co. v. Town of Nottingham, 168 A. 892."

(4) "'Property' is defined to be the right and interest which a man has in lands and chattels, to the exclusion of others. Estes Park Tollroad Co. v. Edwards, 32 P. 549; Ayres v. Lawrence, 59 N. Y. 192; McKeon v. Bisbee, 9 Cal. 137."

In view of the above definitions of the word "property," it is my conclusion that the above quoted provision has reference to the veteran's interest or equity in real and personal property rather than to the total value of the property.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

March 22, 1948.

Hon. L. L. Armstrong,
 Sheriff, Washington County,
 Chatom, Alabama.

Sheriffs—Costs and Fees—Counties—Roads and Bridges.

1. A sheriff performing duties in connection with the public roads, on request of the county governing body, is entitled to claim fees therefor. Title 11, Section 34, Code of Alabama 1940.

2. The county governing body having requested the performance of such services and such services having been performed, may set the fee to be allowed to a sheriff in an amount not exceeding \$90.00.

3. Claims must be presented to the county governing body within twelve months from the time they become payable. Title 12, Section 118, Code of Alabama 1940.

Opinion by Assistant Attorney General Sykes.

Dear Sir:

Your request for an official opinion bearing date of March 4, 1948, is as follows:

"Kindly advise me if the sheriff is entitled to \$90.00 for road service in Washington County. If this be a legal claim of the sheriff's, how far back would I collect same."

You are advised that the sheriff is entitled to receive a fee not in excess of \$90.00 when he performs the services described under the provisions of Title 11, Section 34, Code of Alabama 1940. In part, this section provides as follows:

"Sheriffs are entitled to receive the following fees for the following services:

* * * * *

"Discharging his duties in relation to the public roads, he is entitled to receive annually, on showing to the court of county commissioners that he has discharged his duties, to be paid out of the county treasury, not exceeding..... 90.00"

In an opinion appearing in Quarterly Report of Attorney General, Vol. 12, page 212, it is stated:

"If a county governing body orders the sheriff to perform certain duties in relation to the public roads, and Section 1397(110),

supra, gives it authority to do so, and he shows to their satisfaction that he has performed these duties, which he must perform (Section 10189, supra), it is my opinion that the above quoted provisions of Section 7287 of the Code of Alabama of 1923 are authority for the county governing body to pay the sheriff from county funds an amount for this service or these services not exceeding \$90.00. The amount that he shall be paid, up to the \$90.00 limit, and the question of whether or not he has performed his duties in relation to the public roads are questions that address themselves to the discretion of the county governing body."

You are further advised that claims for compensation or fees of this type must be presented for allowance by the court of county commissioners twelve months after the time they accrue. Title 12, Section 118, Code of Alabama 1940.

Very truly yours,

A. A. CARMICHAEL,

Attorney General.

March 22, 1948.

Hon. Frank O. Deese,
Judge of Probate, Dale County,
Ozark, Alabama.

Counties—Employment, Employers, Employees.

1. In the absence of statute, a county is not liable for the tortious acts of its officers, agents, servants, and employees.

2. Unless authorized by statute, the court of county commissioners has no authority to expend county funds for the payment of a claim for damages incurred through the negligence of one of the employees of the county.

Opinion by Assistant Attorney General Arbuthnot.

Dear Sir:

Your request for an official opinion bearing date of March 10, 1948, is as follows:

"I desire your official opinion on the following question: One of the county road repair crews in this county was repairing a sewer across the road at a sharp curve. A county truck was placed on either side of the sewer, but no warning signals had been placed to notify the public of danger. A citizen of this county, with his wife and baby on a pick-up truck, in coming around the sharp,

blind curve ran into one of the county trucks, doing considerable damage to his own truck and painfully injuring his wife and baby. He states that the total expense incurred for the repairs of his truck and medical attentions for his wife and baby runs to approximately \$75.00.

"I desire your official opinion as to whether Commissioner's Court may legally pay this claim to reimburse this man for the money that he has paid out on damages to his car and medical services to his wife and baby.

"Your prompt attention to this inquiry will be highly appreciated."

In answer to your inquiry, it is my opinion that the Commissioner's Court of Dale County cannot legally pay the claim under consideration.

In an opinion of this office found in Biennial Report of Attorney General, 1928-30, page 265, it was held that the county was not authorized to pay a claim for damages arising out of an accident in which a person was killed by a county truck. The following statement and list of authorities are found in this opinion:

"The general rule of law that the superior or employer must answer civilly for the negligence or want of skill of his agent or servant in the course or line of his employment, by which another is injured, is not applied to counties except where there is a statute imposing liability for the tortious acts of its officers, agents, servants and employees.

"15 Corpus Juris, p. 570.

"Counties are not liable for the neglect of their officers to perform a corporate duty unless such a right is given by statute. There is nothing in our general statutes which subjects the county to such a liability, and the general law must prevail.

"Hamilton v. Jefferson County, 96 So. 628; Jones v. Jefferson County, 206 Ala. 13; Heigel v. Wichita County, 84 Texas 392; Dowling v. Mason County, 87 Kentucky 208."

See also Moore v. Walker County, 236 Ala. 688, 185 So. 175.

The Court of County Commissioners of Dale County was created by statute, and has only such powers as were conferred upon it by statute. It can expend public funds only when expressly authorized by law. I find no provision of law which authorizes the expenditure of county funds for damages incurred through the negligence of one of its employees. Quarterly Report of Attorney General, Vol. 33, page 79; Woodruff v. Beeland, 220 Ala. 652, 127 So. 235. See also Biennial Report of Attorney General, 1936-38, page 427; Quarterly Report of Attorney General, Vol. 15, page 219; opinion rendered to Hon. W. C. Beeme, Attorney at Law, Bay

Minette, Alabama, under date of March 17, 1948 (Ms.).

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

March 22, 1948.

Hon. O. E. Cole, Chairman,
The Court of County Commissioners,
Russell County,
Phenix City, Alabama.

Counties—Liens—Liability for paying.

Where a county condemns land for public use, and the land so condemned has an outstanding lien against it at the time of condemnation, the county may legally pay and discharge such lien.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

Your request for an official opinion, bearing date of February 25, 1948, is as follows:

"As Chairman of the Court of County Commissioners of Russell County, Alabama, I request of you an official opinion on the following:

"The County of Russell in 1936 filed condemnation proceedings to condemn a Courthouse site. Thereafter the Probate Court appointed Commissioners to ascertain the value of the land suited to be condemned. The Commissioners made their awards and filed the report in the office of the Judge of Probate which report was never confirmed by the Court. The County thereafter secured warrant deeds from the owners without reservations but the Commissioners so appointed ascertained that there paving liens taxed against said property of the City of Phenix City and which were unpaid and in their report to the Court (which was not confirmed) the Commissioners made and reported to the Court that the County in addition would have to pay the paving liens. The amount paid to the owners of the land was the exact amount ascertained by the Commissioners or appraisers appointed by the Probate Court without taking into consideration any outstanding improvement assessment liens. In other words, the amount actually paid was the amount which would have been due the property owners for the taking of the property and the County under the appraisers report would have had to pay the amount due the city of Phenix City for public improvements.

"Quare

"1. Can Russell County pay the paving liens to the City of Phenix City, Alabama in view of the above statements and statements to follow hereafter.

"2. There is nothing on the minutes of the County Commission to show that the Country agreed to pay such paving liens.

"3. No claim was filed by the City until sometime subsequent to January, 1941.

"4. Prior to 1941 payments were made on said paving liens to the City of Phenix City by a previous governing body of the County.

"5. The Site obtained by the County was largely obtained from the Moses estate and M. I. I. Moses was Chairman of the County Governing Board at that time.

"In view of all the facts above set out can the County legally pay these paving liens? As Chairman of the Court of County Commission I request your opinion of this matter fully at your earliest convenience."

My answer to your first inquiry is in the affirmative.

According to the facts set out in your request, the municipal improvement assessment lien in favor of the City of Phenix City was outstanding against the property condemned at the time of condemnation by the county.

The proposition of law is well settled that where a lien has attached to property such lien cannot be discharged other than by payment. This is true even where a county purchases property upon which there is an outstanding lien. The mere fact that the county was the purchaser of the property in question would not change this proposition of law. In other words, the fact that the County of Russell purchased this property did not in and of itself discharge the lien which was outstanding against the property at the time of purchase. There is no magic working in favor of a county in the discharge of liens of this nature. The property itself is subject to the lien and the only way it can be discharged is by the payment thereof. The county stands in no better position in this regard than would an individual had it purchased this property under similar circumstances. Biennial Report of Attorney General, 1936-38, page 616; *Smith v. Franklin County*, 221 Ala. 136, 127 So. 904.

You are, therefore, advised that, after considering all of the statements set forth in your letter, it is my opinion that your county may legally expend its money for the discharge of this municipal improvement assessment lien.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

March 22, 1948.

Hon. Ward W. McFarland,
Director,
State Highway Department,
CAPITOL.

Highways and Highway Department—Bids and Awards—
Contractors.

Road contractor's bid which describes location of his plant as "near Pine Level, Alabama," is a valid bid, especially where he furnishes supplemental information showing that his plant site is within two miles of that town. Title 50, Section 5, Code of Alabama 1940.

Opinion by Assistant Attorney General Barton.

Dear Sir:

Your request for an official opinion, dated March 8, 1948, is as follows:

"Re: Requisition HD 88-220

"Under date of February 20, 1948, the State Purchasing Department received and opened bids pursuant to subject requisition which covers certain road building materials for maintenance of State highways for the 1948 bituminous season.

"As has been customary in the past, the State Purchasing Agent has referred all bids to this Department for its recommendations. In this connection sheet 30 of 69 sheets contains a quotation from W. L. Auxford covering plant mix seal Class 'F' Type 'F-1' for the Seventh Division Maintenance Sections 51-053-01C and 51-053-05C. This particular bid sheet shows a notation 'delivery plant indefinite as to location—not acceptable for consideration,' signed JBK who is of course, Mr. J. B. King, State Purchasing Agent.

"This requirement of 13,400 tons of plant mix seal for the above maintenance sections as called for by the inquiry, specifies request for bids at the vendors plant and Pike Road. Mr. Auxford's bid as you will notice, does not include a bid for Pike Road. At the bottom of this page, you will notice that Mr. Auxford has quoted 'near Pine Level, Alabama' at \$4.95 per ton.

"Inasmuch as the State Purchasing Agent has referred this tabulation to us for recommendation and inasmuch as this particular bid sheet of Mr. Auxford's contains the above mentioned quotation

an official opinion is requested from your office as to whether or not Mr. Auxford's bid should be considered as a firm bid and included in our recommendations to the Purchasing Agent for this award."

Supplementing the information furnished in your request, additional facts have been developed through personal interview with the bidding contractor, Mr. W. L. Auxford. It has been established that he operates a portable asphalt plant which he moves from job to job. Prior to bidding on a particular job he prospects in the vicinity of that job for the purpose of locating suitable sand and gravel pits, upon which he then secures an option. If the successful bidder, he then moves his portable equipment to that point, has liquid asphalt shipped in via tank car, and proceeds to manufacture "plant mix" asphalt dressing for highway maintenance and other purposes. This method of doing business frequently enables him to under bid competitors, since transportation costs must be included by the State in determining the lowest responsible bidder.

In this particular instance Mr. Auxford's plant site is located two miles from the town of Pine Level, Alabama, at a certain sand and gravel pit upon which he has obtained an option. Should he be awarded this contract, he proposes to move his portable equipment to that site and begin manufacture and delivery of "plant mix" asphalt under the terms of his contract. The specifications call for "plant mix" sufficient to re-surface a strip of United States Highway No. 231 in Montgomery County for a distance of 27.2 miles, the project ending at the Pike County Line.

Thus, the practical effect of Mr. Auxford's bid is an offer of on-the-job delivery. His competitors offer delivery at various relatively distant points some as far distant as Birmingham. Pine Level, Alabama is the nearest post office to Mr. Auxford's plant site and its exact location could not otherwise be designated except with reference to Pine Level, which point is 7.3 miles from one end of the job and 19.9 miles from the other end. His plant site is located two miles off of United States Highway No. 231 and southeast of the town of Pine Level.

The term "near" is a relative term, the proper import of which is dependent upon the sense and connection in which it is used. It has no positive or precise meaning and is an indefinite term, the significance of which can be determined only by reference to surrounding facts and circumstances.

In submitting his bid, Mr. Auxford described the location of his plant as "near Pine Level, Alabama" and information subsequently furnished by him shows that his plant actually is located two miles southeast of Pine Level. In my judgment, this description of his plant's location answers legal requirements. The reason for requiring designation of plant location is to enable state purchasing officials to compute comparative transportation costs. Any ambiguity or uncertainty as to this bidder's

plant site could be and actually was removed by request for supplemental information. This doubt having been eliminated, state purchasing officials are now in a position to make an exact comparison of transportation costs and thus determine the lowest responsible bidder.

It cannot be said that, as a matter of law, an asphalt plant located two miles southeast of Pine Level, Alabama is not "near" that town. Therefore, in my opinion, the Auxford bid is a legal and valid bid and should be considered in determining the award of this contract. See *Benton County v. State Highway Commission* (Mo.), 52 S. W. 2d. 995; *Barrett v. Shuyler County Court*, 44 Mo. 197. The original bids submitted with your request are herewith returned.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

March 24, 1948.

Hon. W. H. Wilson,
Judge of Probate,
DeKalb County,
Fort Payne, Alabama.

License and Taxation—Mortgage and Deed Filing Taxes—
Purchase Money Mortgage.

In the event a mortgage is given by the vendee to the vendor for the entire purchase price of real estate which is conveyed by a warranty deed and both instruments are offered for record, a mortgage tax only should be collected.

Opinion by Assistant Attorney General Culverhouse.

Dear Sir:

Your request for an official opinion, bearing date of February 5, 1948, is as follows:

"Please give me your official opinion as to amount of Deed and Mortgage tax that should be collected on a Warranty Deed and Mortgage Deed executed the same date on the same real estate. The same amount showing in the face of both with no down payment showing in the face of the Warranty Deed, in this case the amount involved is \$1400.00.

"Enclosed you will find a photo copy of the Deed and Mortgage

that were filed and recorded in this office. Please return these copies to me."

I am of the opinion that a mortgage tax only should be collected upon the transaction presented in your request, and \$1,400.00 should be the figure upon which you base your computation of the tax due. A deed tax should not be collected. Cf. Title 51, Sections 618, 619(c), Code of Alabama 1940; Quarterly Report of Attorney General, Vol. 2, page 25.

The photostatic copies of the instruments enclosed with your request are returned herewith.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

March 25, 1948.

Dr. D. G. Gill,
State Health Officer,
Department of Public Health,
Montgomery 4, Alabama.

Health and Health Department—Officers and Offices—County Health Officers—Salaries.

The salary of a county health officer is fixed pursuant to the provisions of Title 22, Section 15, Code of Alabama 1940, and is not subject to the limitation of five thousand seven hundred dollars per annum on the salaries of officers and employees of the State of Alabama, generally, contained in Title 41, Section 152, Code of Alabama 1940.

Opinion by Assistant Attorney General Garrett.

Dear Dr. Gill:

Your request for an official opinion bearing date of June 6, 1947, is as follows:

"Title 22, Section 15, Code of Alabama 1940, provides that the salary of the county health officer shall be fixed by the county board of health, subject to the approval of the county governing body and the State Board of Health, and that it shall be payable monthly from the county treasury as in the case of other salaries paid by the county; 'provided that in those counties in which a budget has been provided and agreed upon by the state, county or other contributing agencies, it may be paid out of said budget, by or under the direction of the State Board of Health, as other claims are paid out of said budget.'

"I respectfully request your opinion as to whether or not the salary of a county health officer is subject to the limitation of \$5700.00 per annum contained in Title 41, Section 152, Code of Alabama 1940."

Title 22, Section 15, Code of Alabama 1940, deals specifically with the salary of a county health officer and provides as follows:

"The salary of the county health officer shall be fixed by the county board of health, subject to the approval of the court of county commissioners; or other like governing board and the state board of health, and shall be payable monthly from the county treasury as in the case of other salaries paid by the county; provided that in those counties in which a budget has been provided and agreed upon by the state, county or other contributing agencies, it may be paid out of said budget, by or under the direction of the state board of health, as other claims are paid out of said budget."

Your inquiry presents the question of whether or not the salary of a county health officer, thus fixed, is subject to the limitation of five thousand seven hundred dollars per annum on the salaries of officers and employees of the State of Alabama, generally, contained in Title 41, Section 152, Code of Alabama 1940, which reads:

"When not fixed by law or provided for in the pay plan of the merit system, the governor is authorized to fix or approve salaries of officers and employees of the State of Alabama, but no salary or compensation, including those provided for in the pay plan of the merit system, shall be fixed or approved in excess of five thousand seven hundred dollars per annum unless a different maximum is fixed by law."

At the outset, it should be stated that the State Board of Health, together with the various county boards of health, is an agency of the State, and that county health officers are officers of the State. Title 22, Chapter 1, Section 1 et seq., Code of Alabama 1940; *Walker v. Medical Society of Mobile County*, 247 Ala. 169, 22 So. 715. Such was the effect of prior decisions of the Supreme Court of Alabama and opinions of this office under previously existing statutes. *Hard v. State ex rel. Baker*, 228 Ala. 517, 154 So. 77; Quarterly Report of Attorney General, Vol. 8, page 263. In this connection, I quote from the opinion of the Supreme Court of Alabama, by Mr. Justice Bouldin, in the case of *Hard v. State ex rel. Baker*, supra:

"The state board of health is the supreme supervisory power in this governmental unit, the state health department. It has jurisdiction and authority 'to exercise general control over the enforcement of the laws relating to public health,' detailed largely in Code, § 1051 (as amended by Gen. Acts 1927, p. 774), and further elaborated throughout the chapter on Health and Quarantine.

"We have something of a federated system with county boards of health and county health officers, with defined powers and duties, subject to the supervision and control of the state board of health. Code, §§ 1049, 1052, 1055, and § 1058, as amended by Gen. Acts 1927, p. 775."

Therefore, since a county health officer is an officer of the State of Alabama, it would appear that his salary is subject to the limitation of five thousand seven hundred dollars per annum contained in Section 152, *supra*. However, after a careful consideration of this section, Section 15, *supra*, pursuant to which the salary of a county health officer is fixed, and applicable principles of statutory construction, I am convinced that the salary of a county health officer is not subject to this limitation.

Let us first consider carefully the provisions of Section 152, *supra*, which is composed of one sentence of two clauses. The first clause provides that when the salary of an officer or employee of the State of Alabama is not fixed by law or provided for in the pay plan of the State merit system, the Governor is authorized to fix or approve the same. Thus, this clause deals with salaries of officers and employees of the State of Alabama fixed in three manners:

1. By law.
2. By the pay plan of the State merit system.
3. By the Governor.

The second clause provides that, unless a different maximum is fixed by law, no salary or compensation, including those provided for in the pay plan of the State merit system, shall be fixed or approved in excess of five thousand seven hundred dollars per annum. I think it might well be held that this last clause has reference only to salaries of officers and employees of the State of Alabama referred to in the first clause, or that it should be read as though the word "such" appeared in the last clause immediately before "salary or compensation."

Under such a construction, the limitation contained in this section would not be applicable to the salary of a county health officer for the reason that it is not fixed by law, it is not provided for in the pay plan of the State merit system, and it is not fixed by the Governor. Rather, it is fixed pursuant to the provisions of Section 15, *supra*. (In this connection, it might be stated that the officers and employees of county health departments have never been considered to be subject to the provisions of the State Merit System Law, Title 55, Chapter 9, Code of Alabama 1940. Cf. Quarterly Report of Attorney General, Vol. 42, page 72.)

However, I think there is a more compelling reason why the salary of a county health officer is not subject to the limitation of five thousand seven hundred dollars per annum contained in Section 152, *supra*, but is governed solely by the provisions of Section 15, *supra*, which contains

no such limitation.

Section 152, *supra*, is a general provision of law relating to a general subject, namely, the salaries of officers and employees of the State of Alabama; while Section 15, *supra*, is a special provision of law relating to a specific subject, namely, the salary of a county health officer.

It is a well known principle of statutory construction that where there is a general provision of law dealing with a general subject and a special provision of law dealing with a specific subject, the special provision will be construed as an exception to the general law and, therefore, controlling; or, stated differently, that if there is an apparent conflict between a general provision of law dealing with a general subject and a special provision of law dealing with a specific subject, the general provision will yield to the special, and both will be given effect so as not to conflict. *Herring v. Griffin*, 211 Ala. 225, 100 So. 202; *Downing v. City of Russellville*, 241 Ala. 494, 3 So. 2d 34; *State v. Elliott*, 246 Ala. 439, 21 So. 2d 310.

I am convinced that this well known principle of statutory construction is applicable in the instant case. It, therefore, follows that the salary of a county health officer is fixed pursuant to the provisions of Section 15, *supra*, and is not subject to the limitation of five thousand seven hundred dollars per annum on the salaries of officers and employees of the State of Alabama, generally, contained in Section 152, *supra*.

In reaching this conclusion, I have not overlooked Quarterly Report of Attorney General, Vol. 28, page 53, which holds that officers and employees of county health departments are subject to the limitations of Title 41, Section 154, Code of Alabama 1940, with reference to travel allowance. The rule of statutory construction there followed is not here applicable. This for the reason that as to the subject of travel allowance, there is no special provision of law dealing specifically with officers and employees of county health departments, such as Section 15, *supra*, which deals specifically with the salary of a county health officer; and, therefore, the general provision of law dealing with the subject, Section 154, *supra*, controls.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

March 26, 1948.

Hon. J. C. McGough,
Probate Judge,
Fayette County,
Fayette, Alabama.

Condemnation—Counties—Highways.

Where county officials, under authority of Title 12, Section 198, Code of Alabama 1940, appropriated for bridge repair purposes materials owned by the Judge of Probate, subsequent payment to him of their reasonable market value was not violative of Title 41, Section 211, Code of Alabama 1940.

Opinion by Assistant Attorney General Barton.

Dear Sir:

Your request for an official opinion, dated March 16, 1948, is as follows:

"On May 12, 1947, the County Commissioner from District 4 of Fayette County, Alabama, requisitioned 1000 feet of white oak piling and used same to repair the bridge across Haris' Creek on the New Mill Road in Fayette County. The County Commissioner had to repair this bridge immediately in order to prevent a stoppage of travel over and across said bridge on said highway, and without my knowledge at the time, he requisitioned and took 1000 feet of such pilings to make such repair. I did not offer to sell him these pilings at any price, but the County Commissioner who requisitioned the pilings, as well as the entire members of the Court felt that I should be imbursed to the extent of a reasonable amount for this timber, and the amount was fixed at \$40.00 and same was paid to me. The State Examiners have questioned the legality of this payment as in violation of Section 211, Title 41 of the 1940 Code, but due to the fact that I did not negotiate such a sale, and the further fact that the timber was taken and used without my previous knowledge and consent, I desire to have your official ruling whether or not it was illegal for Fayette County, under the circumstances mentioned above, to re-imburse me for the reasonable value of the timbers used not withstanding the provisions of Section 211, Title 41 of the 1940 Code of Alabama?

"Your prompt answer will be highly appreciated."

Your question is answered in the negative.

The power of eminent domain is an attribute of the sovereignty of the state, and is absolute except as restrained by the Constitution. It is in the nature of a forced sale and is an inherent power of the state. See Constitution of Alabama 1901, Section 23.

Title 12, Section 198, Code of Alabama 1940, provides:

"Counties may acquire by purchase or by condemnation, land necessary for drainage ditches and borrow pits, lime and stone quarries, clay and clay pits, sand and sand pits, chert and chert pits, gravel and gravel pits, together with any and all other materials of

every character that may be necessary or essential or desired in the construction and maintenance of highways and bridges, and may tap and draw material from the same and such road right of way as may be necessary for ingress or egress to and from such material. The reasonable market value, if any, of such land and material to be paid for same."

Therefore, in my judgment, not only was it not illegal for Fayette County to reimburse you for the reasonable market value of the aforementioned bridge pilings, but it was the county's legal duty to reimburse you. Since this transaction involved the right of eminent domain and was in no sense a voluntary contractual relationship, in my judgment it does not offend the prohibition contained in Title 41, Section 211, Code of Alabama 1940.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

March 30, 1948.

Honorable J. N. Sadler,
Member Democratic Executive Committee,
Lowndes County,
Burkville, Alabama.

Elections—Offices—Counties—

One who actually lives in Montgomery County and claims his homestead exemption there is not qualified to become a candidate for the Board of Revenue in Lowndes County.

Opinion by the Attorney General.

Dear Sir:

Your request for an official opinion, bearing date of February 12, 1948, is as follows:

"As a member of the Executive Committee of Lowndes County, I would like your opinion in the following matter:

"We have a voter in this county who wishes to qualify as candidate for the office of Board of Revenue. He does not reside in Lowndes. In fact, he actually lives in Montgomery County, and claims his homestead exemptions there.

"I would like to know if, under these circumstances, he can qualify as a candidate for Board of Revenue, and, if so, does our

committee rule on the matter.”

In answer to your letter, I beg to advise you that the voter you mention in your letter is not qualified to become a candidate for member of the Board of Revenue of Lowndes County.

You state in your letter that this person actually lives in Montgomery County. It is my opinion that our statute known as the “Liner Statute” does not apply in this case.

It has come to my attention that this matter, involving one of your citizens, (Mr. J. L. Crenshaw, as I recall), has been reviewed heretofore by a member of the State Executive Committee in Montgomery, and has also been reviewed by the Chairman of the State Democratic Executive Committee.

My information is that both the Chairman of the State Democratic Executive Committee, and the member of the State Executive Committee, who lives in Montgomery, have advised Mr. Crenshaw that he is not qualified under the law to become a candidate for membership on the Board of Revenue of Lowndes County.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

March 30, 1948.

Hon. John B. Sockwell,
Judge of Probate,
Colbert County,
Tuscumbia, Alabama.

United States—Motor Vehicles—License Tags—License Inspectors.

1. Personal property permanently located upon land owned by the Federal Government and over which the Federal Government has acquired exclusive jurisdiction is not subject to State ad valorem tax..

2. Automobiles owned by individuals residing upon land owned by the Federal Government and over which the Federal Government has exclusive jurisdiction are not subject to State and County ad valorem taxation, even though such automobiles are used upon the public highways of this State.

3. Such automobiles, however, are required to bear an automobile license tag procured in the county in which such Federal Reservation is located.

4. A corporation which has its headquarters, office, principal place of business, and garage in Colbert County and operates buses on regular schedules within Colbert and Lauderdale Counties, must procure its license tags in Colbert County.

5. It is the duty of the license inspector to cite the operators of motor vehicles that carry an improper or illegal license tag.

Opinion by Assistant Attorney General Goodwyn.

Dear Sir:

Your request for an official opinion bearing date of August 21, 1947, is as follows:

"Please kindly give me a ruling upon the following questions:

"1. Whether personal property is subject to State and County taxation if the personal property is located upon land acquired by the United States Government for the Nitrate Plants at Muscle Shoals and now controlled by the Tennessee Valley Authority, said personal property being owned by a person who resides upon said Government Reservation.

"2. Whether automobiles located upon said property and owned by individuals residing thereon is subject to State and County ad valorem taxation if the automobiles are used upon the public highways of this State.

"3. The said Nitrate Plant property which is under the control of the Tennessee Valley Authority is wholly within the boundaries of Colbert County.

"Can a person residing on said property and owning an automobile located thereon legally procure his automobile license tag in any county except Colbert?

"4. The Shoals Transit, Inc. has its headquarters and office and principal place of business and garage in Sheffield, Colbert County and operates buses on regular schedules between Tuscumbia and Sheffield in Colbert County and Florence in Lauderdale County. This company procures license tags in Lauderdale County for some of its buses.

"I am of the opinion that the tax and license on all of said buses should be paid in Colbert County. Please advise whether my interpretation of the law is correct.

"5. Please kindly advise me what legal steps can be taken to

cause license tax to be paid in the proper county and whose duty it is to enforce the law in this respect.

"Please kindly give me a ruling upon these questions at your earliest convenience as it is important to have this information before the tax assessing year begins October 1, 1947."

The answers to your questions are as follows:

1. No, if the property is permanently located upon such reservation.
2. No.
3. No, the license should be taken out in Colbert County.
4. Yes, the license should be taken out and tax paid in Colbert County.
5. The license inspector should cite the taxpayer for the proper license.

It has been ruled by this office that the Muscle Shoals Reservation, now controlled by the Tennessee Valley Authority, is under the exclusive jurisdiction of the Federal Government.—Quarterly Report of Attorney General, Vol. 20, page 38.

It has been further ruled by this office that there was no change made by the Code of 1940 in the exclusive jurisdiction of lands acquired prior to the effective date of such Code.—Quarterly Report of Attorney General, Vol. XXIII, page 227.

1. The answer to your question number 1 was decided by this office in Biennial Report of Attorney General, 1932-34, page 408, in which it was ruled that if property is permanently located on a Federal Reservation, it is not subject to the jurisdiction of the State for ad valorem taxes.

2. It was ruled by this office in Biennial Report of Attorney General, 1930-32, page 287, that motor vehicles owned by individuals residing on government reservations are not subject to ad valorem tax where the State has ceded exclusive jurisdiction to the United States. However, the same opinion holds that such motor vehicles are subject to motor vehicle license tax when used on the public roads of this State. Such opinion rules that the Alabama statutes have expressly provided that motor vehicles shall be assessed for ad valorem taxes where the owner of such motor vehicle resides if the vehicle is owned by an individual; and if owned by a firm or corporation, in the county where the same is used.—CF Quarterly Report of Attorney General, Vol. 25, p. 124.

It was likewise held in a prior opinion reported in Biennial Report of Attorney General, 1928-30, page 369, that motor vehicles owned by persons residing upon Federal Reservations under the exclusive jurisdiction of the United States must procure a motor vehicle license if such

vehicle is operated upon any public highway of this State. It was further ruled in such opinion that the fact that such vehicle is devoted in part to government service by the individual owning it is immaterial.

3. Individuals who must procure a motor vehicle license and who reside within the boundaries of Colbert County should procure the motor vehicle license tag in Colbert County. Quarterly Report of Attorney General, Vol. 42, page 38.

4. Under the facts as stated in your request, the county in which the license tags of the Shoals Transit, Inc., should be procured is Colbert County. License tags for motor vehicles owned by a corporation should be taken out in the county in which the motor vehicle is "principally used or operated." Although such motor vehicle enters Lauderdale County, it is my opinion that Colbert County is the County in which they are "used or operated," meaning the principal place in which the vehicles are used or operated, as such expression is used in Title 51, Section 704, Code of Alabama 1940, as amended by Act No. 314, General Acts 1945, page 504, approved July 7, 1945.—Biennial Report of Attorney General, 1930-32, page 739, Quarterly Report of Attorney General, Vol. 26, page 133.

5. Under the provisions of Title 51, Section 835, Code of Alabama 1940, it is provided: "(a) If the license inspector shall discover any motor vehicle being operated without a proper or legal license, he shall cite the operator of the motor vehicle * * *." It is further provided in subsection (b) of said section that: "If such delinquent shall fail or refuse to take out license, the license inspector shall institute or cause to be instituted criminal proceedings against such delinquent before any county having jurisdiction of such offense. * * *"

The so-called "Buck Resolution," an enactment of the Congress of the United States, Public Number 819, 76th Congress, Chapter 787, 3rd Session, H. R. 6687, approved October 9, 1940, makes no change in the law with respect to the prohibition against a state to levying ad valorem taxes upon Federal Reservation.

If exclusive jurisdiction of a reservation has been ceded by the state to the Federal Government and has been accepted by the Federal Government, as has been held by this office with respect to the Muscle Shoals and Tennessee Valley Authority Reservations, the State cannot subsequently limit the cession of jurisdiction without consent of the United States.—In Re Ladd, 74 F. 31, State v. DeBerry, 224 N. C. 834, 32 SE (2d) 617.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

March 31, 1948.

Hon. John T. Frazer,
Judge of Probate,
Lee County,
Opelika, Alabama.

Filing Tax—Mortgages—

A mortgage was executed by the X Corporation to A and B for \$40,000, which was recorded and the mortgage tax paid. Under the provisions of mortgage, A and B advanced an additional \$40,000 to the Corporation. The total obligation was due April 1, 1952. A and B assigned certain interests in the \$80,000 obligation to C and D. X Corporation having notice of the assignment, arranged with A, B, C and D to make a single mortgage for \$80,000 to be paid March 1, 1953.

The mortgage tax should be collected on the amount of the new mortgage, that is, on \$80,000.

Opinion by Assistant Attorney General Kohn.

Dear Sir:

Your request for an official opinion, bearing date of March 9, 1948, is as follows:

"I would like to have your opinion on the following question:

"A mortgage was made by the X Corporation to A and B for \$40,000.00 which was recorded and \$60.00 recording tax was collected under Title 51, Section 619, of the Code. Under a provision in the mortgage A and B advanced an additional \$40,000.00 (unrecorded). The total obligation was due April 1, 1952. A and B assigned certain interests in the \$80,000.00 obligation to C and D and the X Corporation, having notice of the assignments, arranged with A, B, C and D to make a single mortgage for \$80,000.00 for the sake of simplicity to be payable March 1, 1953. Must I require a recording tax of \$120.00 on the full \$80,000.00 obligation, or only \$60.00, considering that there is a new mortgage only to the extent of \$40,000.00?

"It seems that practically and factually the only new portion of the mortgage is \$40,000, even though the maturity date is extended a few months, and assignees are made payees. If a technical view is taken, the parties will feel that a double tax is being imposed and will probably permit the original mortgage to remain unsatisfied rather than pay \$120.00 to satisfy it and record the new mortgage which includes it."

In answer to your inquiry, it is my opinion that you should collect a mortgage tax on the full amount of the new mortgage, that is, on \$80,000. This new mortgage does not come within the exemption as prescribed under Title 51, Section 619(d), Code of Alabama 1940, which provides as follows:

"§ 619. Mortgages, deeds of trust, etc.; recordation.—No mortgage; deed of trust, contract of conditional sale, or other instrument of like character which is given to secure the payment of any debt, which conveys any real or personal property situated within this state, or any interest therein, shall be received for record unless the following privilege or license taxes shall have been paid upon such instrument before the same shall be offered for record to-wit: * * * (d) The privilege taxes required by law to be paid on mortgages, deeds of trust, and similar instruments shall not be required on or for the filing of any such instrument, providing additional or substantial security for any indebtedness secured by an instrument previously filed, upon the filing of which the taxes provided by law have been paid or which was filed at a time when no such privilege taxes were required by law, provided the secured indebtedness remains unchanged in amount and in time of maturity. * * *"

The amount of debt secured by the original mortgage is changed in the new mortgage, the maturity date of the old mortgage is changed, and there are additional mortgages in the new mortgage. See Quarterly Report of Attorney General, Vol. 24, page 234, which holds:

"that, in order for an additional mortgage securing an indebtedness, as to which the mortgage filing tax has been paid, to enjoy the exemption, the debt secured by the original mortgage must remain unchanged both as to amount and as to maturity."

and

"that to enjoy the exemption the later, or 'additional security mortgage,' must secure the same debt as the original mortgage, that not only must creditor and debtor be the same in both instruments, but there must be identity of amount and maturity of the debt in both."

See also Quarterly Report of Attorney General, Vol. 19, page 181.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

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